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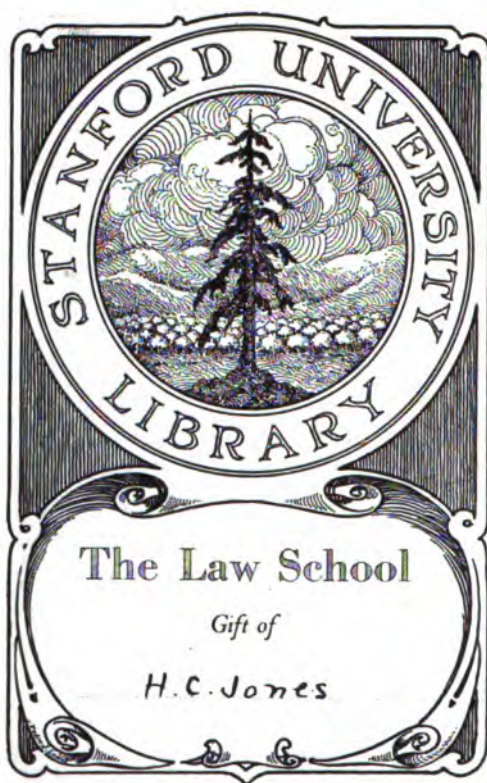
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THE
AMERICAN PROBATE REPORTS:

CONTAINING

RECENT CASES OF GENERAL VALUE DECIDED IN
THE COURTS OF THE SEVERAL STATES ON
POINTS OF PROBATE LAW.

WITH NOTES AND REFERENCES.

BY

CHARLES FISK BEACH, JR.,

OF THE NEW YORK BAR,

AUTHOR OF "A MANUAL OF THE LAW OF WILLS."

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VOL. VI.

NEW YORK:
BAKER, VOORHIS & CO., LAW PUBLISHERS,
66 NASSAU STREET,
1890.

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324015

Y3A 9811 0507M12

WILLIS McDONALD & CO., PRINTERS,
89-43 Gold Street, N. Y.

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THE
AMERICAN PROBATE REPORTS.

THE
AMERICAN PROBATE REPORTS.

SLOANE vs. STEVENS.

[107 New York, 122.]

CODICIL.—WHEN THE WORD “WILL” DOES NOT INCLUDE
THE CODICIL.

In general a will and codicil are to be taken together as constituting one testamentary act; but this rule does not apply where it appears that the word “will,” as used by the testator, was not intended to include the codicil.

APPEAL from an order of the General Term of the Superior Court of the City of New York. The opinion discloses the facts.

John C. F. Gardner, for the appellant.

Albert G. McDonald, for the respondent.

FINCH, J. One would hardly have expected that the will of so eminent and able a lawyer as the late Charles O'Connor would come before us for construction, and present a question quite debatable and involving some difficulty. He made his will, about which as it stood at the date of its execution there was no ambiguity, and which had the clearness and precision we were certain to anticipate. But fifteen months later, and about two weeks before his death,

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he made and executed a codicil which creates a serious difficulty, and, if drawn by him or at his verbal dictation, may have some explanation in his failing health. By the terms of the will he released in its sixth clause certain of his debtors, conveying his purpose in the following language: "I hereby release all claims or demands, which I may have at my death, against any person or persons named in this will." In the codicil which he executed, his attention was again drawn to his debtors, and his duty or pleasure as it respected their indebtedness to him, for its fourth clause provides: "to Francis C. Barlow, Samuel Ward and Edmund Elmendorf, Jr., respectively, I give any sums of money in which any of them may chance to stand indebted to me at the time of my death. Notes, if found, etc., to be canceled and delivered up." Immediately following this is the provision out of which the present controversy has arisen and which reads thus: "All books, papers, duplicates, etc., having any relation to the Tennessee bondholders' claims I give to my faithful and honorable friend, C. Amory Stevens, to use in his discretion." The representatives of O'Connor have sued Stevens to recover \$50,000 for legal services of their testator, in the case referred to. The complaint sets out the will and codicil in full, and a schedule of the services claimed, which ante-dated both the will and the codicil, except the last item which is earlier than the codicil by about a month. The defendant has demurred, insisting that by the terms of the will he is released and discharged from all liability. We cannot, therefore, stray outside of or beyond the allegations of the pleading. If there be extrinsic facts bearing upon the construction of the will and codicil, they are not now before us, and we must treat the case as if there were none material or admissible and be guided only by the words of the testator. The dispute turns upon the meaning of the phrase, "in this will," and seeks to evolve the sense in which it was used. The appellant argues that the will included the codicil, and the two instruments together constituted one testamentary act; that the execution of the codicil was a

republication of the will as of that date, and the two instruments are to be read together as if their provisions had all been embodied in one, then for the first time executed, and that the testator thoroughly knew the rule and appreciated its force, and must be assumed to have intended when he released those "named in this will" to have intended to release also those named in any codicil which might thereafter be executed, and become part and parcel of the testamentary act. There is abundance of authority establishing the general rule (*Sherer v. Bishop*, 4 Brown's Ch. Rep. 55; *Doe v. Walker*, 12 M. & W. 591; *Washburn v. Sewall*, 4 Metc. 63; *Van Cortlandt v. Kip*, 1 Hill, 590; *Caulfield v. Sullivan*, 85 N. Y. 153); and if it stood without limitation it would go far to justify the contention of the appellant. But while the word "will" may and often does cover codicils afterwards made, and embrace the entire testamentary act, it nevertheless, as frequently and more naturally is descriptive of the particular instrument as distinguished from that other and different instrument denominated a codicil. Where both instruments exist, however in the end and for many purposes they may constitute one testamentary act, they are nevertheless properly described, the one as a will and the other as a codicil, and those are appropriate words to discriminate and distinguish between them. In such case a testator may mean by the phrase "this will" the instrument as first prepared and not as subsequently modified by a codicil; and since, in questions of construction, the intention of the testator is to govern, it becomes necessary to determine in which sense he used the word. It has, therefore, been decided that the word "will" does not cover or embrace the codicil where anything appears to show that it was not intended to do so. (*Fuller v. Hooper*, 2 Ves. Sr. 333; *Cole v. Scott*, 19 L. J. R. [N. S.] 63; *Pierpont v. Patrick*, 53 N. Y. 591; *Wetmore v. Parker*, 52 N. Y. 450, 463.) These cases show the distinction between the will as a final testamentary act and the will as an instrument distinguished from another instrument called a codicil; and show that the former instrument will speak

from its own date, and not from the death of the testator, where such an intent is manifest.

The testator seems to have had in mind this distinction, and discriminated between the two instruments. At the close of the will he formally revokes all previous "wills and codicils." He treats the two or more instruments not as together constituting wills and revocable by that name, but as separate and distinct instruments, and revokes not one but each, and by their appropriate and usual designation. The release which he gave came at the close of the will, and after he had named all to whom it was to apply. There can be no doubt that, when he executed the will in which Stevens was not named, he did not then mean to release the latter. If he subsequently formed a different intention we should expect to see it manifested. The failure to do so becomes more significant when we observe that he describes the codicil by that appropriate name, saying: "This is Charles O'Connor's first codicil to his last will and testament. This instrument made and signed April 28, 1884." Words of release are absent as to Stevens although present as to others. Ward was not named in the will and so was released in the codicil. Stevens was not named in the will nor released in the codicil. Barlow and Elmendorf were named in the will and so discharged, but were again named in the codicil and again formally released. The appellant seeks to give a reason for this beyond forgetfulness on the one hand, or abundant caution on the other. He says the reason for the clause was to require the delivery up and cancellation of notes, etc., held against Barlow and Elmendorf. But that provision is merely incidental and does not account for the words of release which, as to these two persons, were needless. To make the surrender of evidences of debt the motive of the clause is to elevate the incident to the place of the principal, or seize upon a casual and, perhaps, needless remark as the key of an argument or the doctrine of a judgment. Precisely why the two legatees already released by the will were released by the codicil it is not easy to determine; but the materiality

of the clause lies mainly in the fact that the attention of the testator was drawn to the case of his debtors, and so strongly drawn as to induce a repetition, and, nevertheless, in the next clause Stevens is named but without words of release.

An examination of that clause indicates a very distinct and definite purpose. In the progress of the Tennessee case the testator had doubtless accumulated important and material papers, his own briefs and memoranda being of great utility and value to his client. Mr. O'Connor had a lien upon all these papers for his compensation and probably realized that after his death his representatives might withhold them from a successor until the debt was paid or secured. But this step might be very troublesome and injurious to Stevens. The appeal to the Federal Court of last resort was approaching argument, and the prompt possession of the papers might be very important to the litigant deprived of his counsel by death. The testator had great confidence in Stevens, and so he gave the papers to him, thereby waving his lien and calling his client "my faithful and honorable friend." His meaning seems to have been that he could trust Stevens to make a fair and honorable settlement without the coercion of a lien and the withholding of books and papers, and so the testator directed that course to be pursued. Of course this was a needless precaution if the debt was released for the lien would fall with it, and the naked surrender of the lien carries an implication of a purpose to retain the debt.

Recurring now to the will, certain portions of it become important. The release is of persons named in "*this will*;" not "in my will" as might have been the expression if the testator looked forward to codicils naming others, but in *this will*; that is, in the will which I now, on this day, make. At that date a large part of the debt of Stevens had accrued. The testator knew him as one of his debtors and plainly then intended not to release or discharge him. The persons to be discharged were identified by the phrase "named in *this will*;" not in some other will or codicil to

be possibly thereafter made, but named in *that* will and so then and there identified. That was the clear and certain construction of the words "in this will" when it was executed, and that meaning and legal effect cannot be changed by the codicil unless the codicil shows an intent to make the change. This codicil does not. Its intent points in the contrary direction. Its purpose was other and different. Our conclusion, therefore, is in harmony with that of the courts below.

The order should be affirmed, with costs, but with leave to the defendant, upon payment of costs, to withdraw his demurrer and serve an answer within twenty days from the entry of judgment.

All concur, except RAPALLO, J., not voting.

Order affirmed.

See also *Brown v. Riggin*, 1 Am. Prob. Rep. 238; *Brown v. Clark*, Id. 510, and the note; *Caulfield v. Sullivan*, 2 Id. 43, and the note; *Buchanan v. Lloyd*, 5 Id. 30; *Wheeler v. Fellowes*, Id. 76; *Hatcher v. Hatcher*, Id. 439, and the note.

MATTER OF PATON.

(111 New York, 480.)

MEANING OF THE WORD "CHILDREN."

Whether the word "children," as used in a will, was intended to be limited to its primary meaning, or to be used in the broader sense of "issue," may be determined by a resort to the context; and that meaning ought to be preferred, when the reason of the matter sustains it, which makes it include the children of a deceased child.

APPEAL from a judgment of the General Term of the Supreme Court in the first department.

Jesse K. Furlong, for the appellant.

Thomas Fenton Taylor, for the trustee.

GRAY, J. The question presented by these appeals is as to the construction to be given to the language in the ninth clause of the will of John Kurst. The will was made in 1858 and the testator died in 1863. His wife survived him and died later in the same year. At his death there were living two sons; a daughter, Julia, mentioned in the will, having died before testator at the age of nine years. One of the sons, Charles, was married when his father made this will, and he died before his mother, leaving two sons, parties and appellants in this proceeding. The claimants to the fund in the trustee's hands were John B. Kurst, who survived both of his parents, and the two grandsons of testator, sons of his deceased son Charles.

John B. Kurst contended that he alone was entitled to the whole of the fund, and the surrogate sustained him in that contention. The grandsons of testator claimed the right to share in the fund, either *per capita* or *per stirpes*, and the General Term, reversing the surrogate, decided that they were entitled between them to one-half of the fund.

The ninth clause of the will reads as follows:

"*Ninth.*—I order and direct that after the decease of my said wife, and my youngest child shall arrive at the age of twenty-one years, my executor hereinafter named, or such person or persons as may then legally represent my said estate and the interests of my said children, shall dispose of all such property as may then remain of my said estate within eighteen months thereafter, either at public auction or at private sale, as such executor, person or persons may in his or their judgment deem most advantageous and beneficial to my children, and out of the proceeds thereof, after first deducting all necessary expenses, divide the same, together with all other property belonging to my estate, *equally among the children I may then have, or those who may be legally entitled thereto*, excepting, however, from the above disposition of my said estate all my silver spoons, one pianoforte, which I now have, and the portraits of myself, my wife, and my mother, which spoons, pianoforte and por-

traits I hereby give, devise and bequeath to our daughter, Julia Kurst, her heirs and assigns, forever,"

The difficulty arises from the language of the will in this clause, which speaks of a division of the proceeds of the sale of the estate "equally among the children I may then have, or those who may be legally entitled thereto." The will is evidently not drawn by a hand skilled in the requirements of such an important instrument; but enough appears from its reading to satisfy us that what the testator meant to accomplish was, such a distribution of his property, as that not merely his immediate issue should be benefited, but also the issue of any of his sons and daughters who may have died before his widow. Certainly no words or provisions can be found in the instrument which preclude the issue of a son or daughter from sharing in the testator's estate; if we can give to the word "children," as used, or as understood in the use of the word "those," in this clause, that more comprehensive sense, which will include issue however remote. As Judge STORY said, in the case of *Parkman v. Bowdoin* (1 Sumner, 368), where he reviews a number of authorities from an early date: "Although in its primary sense, the word 'children' is a *descriptio personarum* who are to take, there is not the slightest difficulty in giving it the other sense, when the structure of the devise requires it."

By reference to the fourth clause of the will, we find the provision that in the event of the marriage of testator's wife, his estate is to "descend to the children we now have, or may hereafter have, according to the laws of the State of New York, subject," etc. In the eleventh clause is contained a provision "that if either one of my said children, or any person or persons who may succeed to the interest of them, or either, shall in any way or manner interfere with the due and proper execution of any one of the provisions of this my last will . . . by commencing legal proceedings in relation thereto, such child or children, person or persons, shall forfeit her, his or their share in my said estate, and such share or shares shall be added to the shares of such child, children or persons as shall not inter-

ferre with the same, and to be equally divided among the persons last-named, share and share alike."

We think that these provisions indicate the understanding of the testator that his sons and daughters might not be living at the time of distribution, and that an intention is deducible that the issue of a deceased son or daughter should share in the proceeds of the estate, upon the sale ordered by him after the decease of his wife.

It is the province of the court, in the construction of a testamentary disposition of property, to effectuate the intention of the testator by giving that direction to the fund which, with all the light that may be cast upon the matter by the proofs, and from a fair reading and a reasonable interpretation of the writing, in all its parts, seems just. We may not make a will for him, nor thwart his manifest purpose; but if the will before us is equally susceptible of one or another interpretation, we should, on every principle of right, and within the spirit of all the authorities, give it that which is most equitable and consonant with the dictates of justice.

In the Matter of Estate of Brown (93 N. Y. 295), where the question was whether the testamentary provision cut off the issue of a son of a deceased daughter, where the testator had given to each of his daughters a life estate in his property "with remainder over to their respective children," RAPALLO, J., said, if the language of the clause "is capable of any construction which would permit the issue of the deceased son to participate in the remainder limited upon his mother's life estate, that construction should, on well settled principles, be adopted in preference to one which should exclude them."

Chancellor KENT says, in his Commentaries (vol. 4, p. 419 n): "Children, as well as issue, may stand, in a collective sense, for grandchildren, where the justice or reason of the case requires it." The word "children" is a flexible expression, and we think that meaning should be preferred, when the reason of the thing sustains it, which permits the children of a deceased child to inherit. (1 Jarman on Wills,

404; *Earl of Tyrone v. Marquis of Waterford*, 1 De Gex, F. & J. 613; *Hodges v. Middleton*, 2 Doug. 431; *Doe v. Webber*, 1 Barn. & Ald. 713; *Prowitt v. Rodman*, 37 N. Y. 42; *Scott v. Guernsey*, 48 Id. 106; *Low v. Harmony*, 72 Id. 408.)

In determining, in a given case, the meaning to be attached to the expression in a will of "children," we may resort to the context to see if the testator has, by his use of language, or by other provisions of the will, made it a flexible term, or whether its primary meaning attaches strictly. The other clauses, which we have quoted from, would be sufficient warrant to give to the clauses under consideration the wider and juster sense, which will include the children of a deceased son or daughter as participants in the fund arising from the sale of the estate. It seems to us that the word "or," in the sentence in question here, implies a substitution, in case of the pre-decease of sons or daughters, of their surviving children. When the testator directs a division "equally among the children he may then have, or those who may be legally entitled thereto," he must be regarded as contemplating the possibility of there being other children entitled to share than his immediate offspring. The word "those" must refer to children, in order to have a meaning, and refers to the children or issue of his sons and daughters. By the force of these provisions, the issue of a deceased child of testator is substituted for the child, and that share in the estate would be distributed among such issue *per stirpes*.

Thus, when we consider the testator's intention as to the future distributees of his estate, with the aid of the context and with the interpretation furnished by him in the provisions of other clauses, there seems to exist no doubt that the children of his deceased son are comprehended in his scheme for the division.

As to the claim of the widow of the deceased son of testator to share in the proceeds, we agree with the General Term that she had none. These grandchildren derived their right to the fund under testator's will and not through their deceased father.

On the proceeding before the surrogate the claim of John B. Kurst, as administrator with the will annexed, to commissions was rejected. The ground of the rejection was that the accounting was by Paton as the trustee appointed to carry the will into effect upon the death of the testator's wife, and related to the proceeds of the sale made by him of the real estate, and the question of the right of the administrator to commissions was reserved, until his accounting as such administrator. We are unable to find any basis for his claim for commissions in this record, and there is nothing for us to pass upon in that respect. That must be the subject of any further proceedings below.

The judgment of the General Term should be affirmed and the matter remitted to the Surrogate's Court to be proceeded with in conformity therewith. Under the circumstances no costs of the appeal are allowed.

All concur.

Judgment accordingly.

See also *Gerrish v. Gerrish*, 1 Am. Prob. Rep. 59; *Ferrer v. Pyne*, Id. 556; *Burnet v. Burnet*, Id. 589, and the note; *Rivenett v. Rivenett*, 4 Id. 264; *Cummings v. Plummer*, Id. 279; *Palmer v. Horn*, 2 Id. 92; *Huston v. Crook*, 3 Id. 41; *Rood v. Hovey*, Id. 402, and the note; *Halstead v. Hall*, Id. 462; *Outcalt v. Outcalt*, 5 Id. 272; *Millett v. Ford*, Id. 384; *Randolph v. Randolph*, Id. 406, and the note.

COLTON vs. COLTON.

[127 United States, 300.]

TRUSTS.—CREATION OF A TRUST BY WILL.—PRECATORY TRUSTS.

No precise or technical language is required to create a valid trust by will, and there can be no general rule for determining whether given language in a will conveys the whole beneficial interest, or whether it creates a trust. If the will creates a valid trust by apt words it is not invalidated by being called "precatory." Where property is given absolutely by will a Court of Chancery will not lightly impose upon it a trust upon the strength of mere words of

recommendation; but where the precatory clause expresses clearly the donor's wish that the donee shall do a given thing with the property, an obligatory trust is created which equity will enforce.

THESE were two bills in equity, one filed by Martha Colton, and the other by Abigail R. Colton, each of whom was a citizen of the State of New York, against Ellen M. Colton, a citizen of California.

Martha Colton alleged in her bill that she was a sister of David D. Colton, who died in San Francisco, California, on October 9, 1878, and that the defendant, Ellen M. Colton, was his widow; that on October 8, 1878, the said David D. Colton made and executed in due form his last will and testament, a copy of which was made a part of the bill, and was set out as follows:

"I, David D. Colton, of San Francisco, make this my last will and testament. I declare that all of the estate of which I shall die possessed is community property and was acquired since my marriage with my wife. I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best. I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise. I hereby appoint my said wife to be the executrix of this my last will and testament, and desire that no bonds be required of her for the performance of any of her duties as such executrix. I authorize and empower her to sell, dispose of, and convey any and all of the estate of which I shall die seized and possessed, without obtaining the order of the probate court, or of any court, and upon such terms and in such manner, without notice, as to her shall seem best. If my said wife shall desire the assistance of any one in the settlement of my estate, I hereby appoint my friend, S. M. Wilson, of San Francisco, and my secretary, Charles E. Green, to be joined with her in the said executorship,

and authorize her to call in either or both of the said gentlemen to be her co-executors; and in case she shall so unite either or both of them with her, the same provisions are hereby made applicable to them as I have before made for her in reference to bonds and duties and powers."

The bill further alleged that on or about October 29, 1878, "the defendant duly filed the said last will and testament of the said David D. Colton in the then probate court in and for the city and county of San Francisco, State of California, and thereafter such proceedings were duly had in said probate court that on or about the 11th day of November, A. D. 1878, an order of said probate court was duly made and entered appointing the defendant executrix of said will and testament, and thereupon the defendant duly qualified as such executrix, and letters testamentary upon the said last will and testament were duly granted and issued to her, the said defendant, and the said defendant thereupon entered upon and thereafter continued to discharge the duties as such executrix until about the 18th day of December, A. D. 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to the said defendant, and she was discharged from any further duties as such executrix."

The bill then alleged that the estate of David D. Colton thus distributed to the defendant was of the value of about \$1,000,000, and that the defendant, though often demanded, has failed, neglected, and refused to make to the plaintiff any gift or provision whatever from the estate of said David D. Colton.

The bill also contained the following allegations:

"Your oratrix further shows that she has no estate, property, or income; that for many years she has been, and still is, dependent upon her mother, the said Abigail R. Colton, for her support and maintenance; that ever since your oratrix was a young child her said mother has been in feeble health, and has always required your oratrix' aid and services, and especially during the lengthened illness and last

sickness of your oratrix' said father, and ever since the death of your oratrix' said father as aforesaid, her said mother has been an invalid, and has endured much sickness and suffering, and has required much medical attendance, and the almost constant nursing and care of your oratrix.

"And your oratrix further shows that about December, 1869, your oratrix' said father, Isaac W. Colton, then residing in the city of New York, at the request of your oratrix' brother, the said David D. Colton, then residing in San Francisco aforesaid, converted all of his property, consisting of what was then known as five-twenty bonds of the government of the United States, as was well known to the said David D., in gold, amounting to the sum of fifteen thousand dollars, and loaned the same to the said David D.; and thereupon your oratrix' father received therefor the promissory note of the said David D. Colton, dated at San Francisco aforesaid, on or about December 7th, 1869, for the said sum of \$15,000, payable in gold, with interest; that afterwards, on or about March 1st, 1873, the said David D. Colton renewed his said note by giving his new note to his father, the said Isaac W. Colton, for the same amount and payable in the same manner, and which said new note was owned and held by your oratrix' said father at the time of his death.

"And your oratrix further shows that her said father died intestate, and that after his death, and on or about March 1st, A. D. 1877, the said David D. Colton, with the consent of your oratrix, took up said last mentioned note by giving his new note therefor, payable to his and your oratrix' mother, the said Abigail R. Colton, for the said sum of fifteen thousand dollars, with interest, and thereby your oratrix surrendered and relinquished all her legal share and interest in the said note so held by her father at the time of his death, as aforesaid, as your oratrix' brother, the said David D. Colton, well knew."

The prayer of the bill is that the "defendant may be compelled to execute the terms and directions of the said last will and testament of the said David D. Colton, and to

make your oratrix a suitable provision from the said estate of the said David D. Colton in such amount and in such manner as to your honors shall seem most meet and proper in the premises."

Abigail R. Colton, complainant in the other bill, is the mother of Martha Colton, and also of David D. Colton the testator. Her bill is in substance the same as that of Martha Colton, and prays for similar relief, but contains the following :

"And your oratrix further shows that the said defendant has, although often demanded, utterly failed, neglected, and refused to make to or for your oratrix any gift or provision whatever from the estate of your oratrix' son, the said David D. Colton, except as hereinafter mentioned, that is to say : On or about March 1st, 1880, the defendant sent to your oratrix the sum of fifty dollars ; and thereafter, at divers times, and at various intervals between the day last named and about the first day of January, 1881, the defendant sent to your oratrix about five other sums of fifty dollars each, amounting in the whole, as above given to your oratrix, to the sum of about three hundred dollars ; and in or about the month of February, 1881, the defendant sent to your oratrix the further sum of six hundred dollars ; and in or about November, 1882, she gave to your oratrix the further sum of six hundred dollars ; the whole given as aforesaid, since the death of the said David D. Colton, amounting altogether to the sum of about fifteen hundred dollars only.

"Your oratrix further shows that she is now in the seventy-fifth year of her age, and that for many years prior to the death of her husband, the said Isaac W. Colton, she was in feeble health, and ever since that event she has been an invalid and endured much sickness and suffering, and has required much medical attendance, and the almost constant nursing and care of her said daughter, Martha Colton, who has always resided with her, until the present time.

"That your oratrix is not the owner of and has no interest in any real estate, or chattels real, except a one-half

lot in Greenwood cemetery, near the city of New York, where her said husband is buried, and that besides her wearing apparel your oratrix has no personal property whatever except the sum of \$15,000, which she has had loaned out upon interest ever since, on or about March 1st, 1877, from which time the possession and loaning out of the said sum of \$15,000 by your oratrix were well known to the said David D. Colton, down to and at the time of his making his last will and testament.

"And your oratrix further shows, that her entire income ever since the death of her son, the said David D. Colton, has consisted solely of the interest moneys arising from the loan of the aforesaid fifteen thousand dollars, and the aforesaid several sums of money given by the defendant to your oratrix as aforesaid; and ever since in November, 1882, her income has consisted and does still consist solely of said interest moneys alone.

"And your oratrix further shows, that at the time of the death of the said David D. Colton, his sister, the said Martha Colton, was not and is not now the owner of any real estate or property, nor has she any income whatever, and your oratrix has, therefore, ever since the death of the said Martha's father provided and still provides her, the said Martha, support and maintenance.

"That by reason of your oratrix' very limited income aforesaid, and notwithstanding great economy in her living and expenses and the denying herself much that would conduce to her health and comfort, your oratrix is in very straitened circumstances."

To each of these bills the defendant demurred, and for causes of demurrer assigned the following:

"*First.* That the said complainant hath not by her said bill made such a case as entitles the said complainant to any relief in this court. Avouching any of the matters therein complained of, in this, that no estate, trust, or interest exists in favor of said complainant or arises in her favor out of the said last will and testament in her bill set forth or any matter, legacy, or devise therein contained.

"*Second.* That this court hath no jurisdiction of the matters and things set forth in said complainant's bill, nor hath it jurisdiction to consider the same or to grant the relief prayed for or any relief whatever.

"*Third.* That neither this court nor any other court whatever hath jurisdiction to hear and determine the matters and things set forth in complainant's said bill or to grant the relief therein prayed, or any other relief whatever.

"*Fourth.* That it appears on the face of said complainant's bill that if any cause of action whatever exists by reason of the matters and things in said bill set forth, that such cause of action is founded upon a stale equity and claim.

"*Fifth.* That it appears on the face of complainant's said bill that the said cause of action therein set forth, if any such exists, accrued more than four years before the commencement of this action, and that the same is barred upon the principle which courts of equity follow in analogy to the statute of limitation at law.

"*Sixth.* That it appears upon the face of said complainant's bill that the said pretended cause of action therein set forth accrued more than four years before the filing of her said bill.

"*Seventh.* That it appears on the face of complainant's said bill that the matters and things therein sought to be inquired of and determined have long since been inquired into and determined against the said complainant by the probate court of the city and county of San Francisco, State of California."

The demurrer to each of the bills was sustained, and they were severally dismissed. (*Colton v. Colton*, 10 Sawyer, 325, 336.) From these decrees the present appeals were prosecuted.

Mr. Sherman Evarts and *Mr. William M. Evarts* for appellants.

Mr. George R. B. Hayes, for appellee. *Mr. John A. Stanly* was with him on the brief.

MATTHEWS, J. These appeals bring before us the will of David D. Colton for construction. The question is, whether his widow, Ellen M. Colton, by its provisions, takes the whole estate of which he died seized and possessed absolutely in her own right, or whether she takes it charged with a trust enforceable in equity in favor of the complainants, and, if so, to what extent. The language of the will to be construed is as follows: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best."

Before proceeding, however, to a consideration of the will itself, we are met with the objection, interposed by the counsel for the appellee, that the matter of the present controversy has already been finally adjudicated. The proposition is, that the decree of the probate court of the city and county of San Francisco, distributing the whole of the estate of the testator to the appellee, was a complete and final adjudication as to all parties claiming, as heirs, legatees, or devisees, any interest, legal or equitable, in or to the estate, and is, therefore, a bar to the present suit. It is contended that by the law of California, the probate court, having jurisdiction over matters relating to the settlement of estates of deceased persons, and, among other matters, to distribute the residue of the estate among the persons who by law are entitled thereto, if a trust is attempted to be created by will, that court must determine how far the attempt is successful, what is the trust, who is the trustee, and who are the beneficiaries, and distribute accordingly.

As there is no plea in bar of the relief sought by the bills, setting up any decree of the probate court to which the appellants were parties, and by which they could be bound, denying to them any interest under the will of the testator, we must look to the bills themselves for the only allegations on that subject. All that is said on the subject

in them is that the defendant "continued to discharge the duties as such executrix until about the 18th day of December, A. D. 1879, when, by an order or decree of said probate court, then and there duly made and entered, the whole estate, real and personal, of the said David D. Colton then remaining was distributed to the said defendant, and she was discharged from any further duties as such executrix."

The entire effect of this averment is to show that the defendant had come into possession of the estate as devisee and legatee, as she was clearly entitled to, as soon as the estate was fully administered by her as executrix. The claims insisted on by the complainants are not against her as executrix, but as devisee and legatee; and the trusts alleged to be created by the will do not arise until the widow of the testator comes into possession of the estate as devisee and legatee. Whatever jurisdiction by the laws of California its probate court may have been entitled to exercise for the purpose of construing the will as between the widow and the present complainants, there is no averment in the pleadings that it was ever exercised. There is, therefore, no adjudication on the subject by the probate court, which has decided the question raised in these suits so as to operate as a bar to their prosecution.

The fundamental and controlling rules for the construction of wills are familiar and well understood. They were well stated by Chief Justice Marshall in delivering the opinion of this Court in *Smith v. Bell* (6 Pet. 68), as follows: "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. (1 Doug. 322; 1 W. Bl. 672.) This principle is generally asserted in the construction of every testamentary disposition. It is emphatically the will of the person who makes it, and is defined to be 'the legal declaration of a man's intentions which he wills to be performed after his death.' (2 Bl. Com. 499.) These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law. In the construc-

tion of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words and ascertaining the meaning in which the testator used them. . . . No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. . . . Notwithstanding the reasonableness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone farther. The construction put upon the words in one will has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; it should never be carried so far as to defeat the plain intent; if that intent may be carried into execution without violating the rules of law. It has been said truly (3 Wils. 141) 'that cases on wills may guide us to general rules of construction; but unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.' " (See *Clarke v. Boorman's Executors*, 18 Wall 493, 502.)

The object, therefore, of a judicial interpretation of a will is to ascertain the intention of the testator, according to the meaning of the words he has used, deduced from a consideration of the whole instrument and a comparison of its various parts in the light of the situation and circumstances which surrounded the testator when the instrument was framed. These rules of construction, indeed, apply to

every written instrument, although in deeds and some other formal documents the long usage of the law has, in certain cases, required the use of technical words and phrases to accomplish particular effects. No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words "upon trust" or "trustee," if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument. (Perry on Trusts, §§ 82, 151, 158; *Cresswell's Administrator v. Jones*, 68 Alabama, 420.)

The question upon the language of the present will, which constitutes the point in dispute, is whether the testator intended to charge his estate in the hands of his widow with a trust in favor of his mother and sister, or whether he intended his widow to take the estate free from any obligation of that character, at liberty to disregard the recommendation and request, and to make provision for his mother and sister or not out of property absolutely her own, as she might choose.

It is argued against the establishment of the trust in favor of the complainants that it is of the nature of those called "precatory trusts," founded originally in the earlier decisions of courts of equity in England and in this country, upon strained, artificial, and inappropriate interpretations of the language of testators, whereby their real intentions were perverted and defeated, according to a rule which is no longer favored as an existing doctrine of equity, and which is excluded by the express terms of the Civil Code

of California, according to which the will in this case must be construed. That code provides that "a will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." (Section 1317.) "In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." (Section 1318.) "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail." (Section 1321.) "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by the inaccurate recital of or reference to its contents in another part of the will." (Section 1322.) "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." (Section 1324.) "The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative." (Section 1325.) "Technical words are not necessary to give effect to any species of disposition by a will." (Section 1328.) And by § 1319 it is provided that these rules are to be observed "unless an intention to the contrary clearly appears." In relation to trusts, the code also provides, in respect to real property, that they must be either in writing or created by operation of law (sec. 852); subject to which condition, it is further provided that "a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty; 1, an intention on the part of the trustor to create a trust; and 2, the subject, purpose, and beneficiary of the trust." (Section 2221.) It will be ob-

served, however, that these statutory provisions of the State of California are merely declaratory of preëxisting law, and are perfectly consistent, if not identical, with rules of construction already noticed as of controlling and universal application.

As to the doctrine of precatory trusts, it is quite unnecessary to trace its origin, or review the numerous judicial decisions in England and in this country which record its various applications. If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it "precatory." The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not to take away the discretion of the legatee growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary.

"All the cases upon a subject like this," said Lord Chancellor Cottenham in *Shaw v. Lawless* (5 Cl. & Finn. 129, 153), "must proceed on a consideration of what was the intention of the testator." In *Williams v. Williams* (1 Simons, N. S. 358, 369), Vice-Chancellor Cranworth said: "The point really to be decided in all these cases is whether, looking at the whole context of the will, the testator has meant to impose an obligation on his legatee to carry his express wishes into effect, or whether, having expressed his wishes, he has meant to leave it to the legatee to act on them or not at his discretion." And referring to rules for

ascertaining this intention sought to be deduced from the numerous decisions on the subject, he adds: "I doubt if there can exist any formula for bringing to a direct test the question whether words of request, or hope, or recommendation are or are not to be construed as obligatory."

In *Briggs v. Penny* (3 Macn. & Gord. 546, 554), Lord Chancellor Truro stated the same rule with a little more particularity. He said: "I conceive the rule of construction to be that words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: first, that they are so used as to exclude all option or discretion in the party who is to act as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced." The most recent declarations of the English courts of equity do not modify this statement of the law. (*Lambe v. Eames*, L. R. 6 Ch. 597; *In re Hutchinson and Tenant*, 8 Ch. Div. 540; *In re Adams and the Kensington Vestry*, L. R. 27 Ch. Div. 394, 406.)

The existing state of the law on this question, as received in England, and generally followed in the courts of the several States of this Union, is well stated by Gray, C. J., in *Hess v. Singler* (114 Mass. 56, 59), as follows: "It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases in this, and in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not

to be lightly imposed, upon mere words of recommendation and confidence."

In the previous case of *Warner v. Bates* (98 Mass. 274, 277), Chief Justice Bigelow vindicated the soundness and the value of this rule in the following commentary. He said: "The criticisms which have been sometimes applied to this rule by text writers and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed *cestuis que trust* are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and, above all, if the recommendatory or precatory clause is so expressed as to warrant the inference that it was designed to be peremptory on the donee, the just and reasonable interpretation is that a trust

is created which is obligatory and can be enforced in equity against the trustee by those in whose behalf the beneficial use of the gift was intended."

In the light of this rule, as thus stated and qualified, we proceed to ascertain the intention of the testator in this will as to the point in controversy. In the first place, the language of the bequest to his wife is undoubtedly sufficient to convey to her at his death the whole estate absolutely and without conditions. The will says: "I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seized or possessed or entitled to." If this stood alone there could be no controversy as to the nature and extent of her title. But it does not stand alone, and it does not contain any expressions which necessarily anticipate or limit any subsequent provisions affecting it. It does not say expressly that she shall have the absolute right to use, for her own benefit exclusively, or the absolute right to dispose of the estate which he gives to her. Her right to use and her power to dispose are merely the legal incidents of the title conveyed by the clause considered as unqualified by its context. But the bequest to the wife is immediately followed by the clause which is the subject of the present contention. In direct connection with this gift to his wife the testator adds: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." It may well be admitted that the recommendation of the testator to his wife to care for and protect his mother and sister, when they should be deprived of the care and protection which he could personally secure to them while he lived, is not sufficient of itself to create a trust and attach it to the estate of his widow, so as to be capable of enforcement. It is certainly the expression of a strong desire on the part of the testator for a continuance of care and protection by his legatee over his mother and sister, but, considered by itself, cannot be construed as creating in them an enforceable right to a beneficial interest in the estate given to his widow. It is rather a personal

charge than a property charge. But he did not leave it so. The testator adds: "And request her to make such gift and provision for them as in her judgment will be best." It is immaterial in the construction of this language to determine whether the word "gift" means a donation from the legatee or from the testator, for it is also to be a "provision." It is this which he requests his widow to make, out of that provision which the testator made directly for her, consisting of the whole of his estate, real and personal. The entire estate bequeathed to his widow is thus affected by this request. Is that request equivalent to a command, or is it a mere solicitation, which after his death she may reject and disregard without violating the terms of his will and the conditions upon which she accepted her estate under it? Is there anything in the language of the clause itself, in its context, or in the circumstances and situation of the testator when he framed it, to indicate an intention on his part to confer upon his widow the authority to accept his property, and at the same time to refuse to use it according to his request? Undoubtedly he gives to her some discretion on the subject; the gift and provision which he requests for his mother and sister is to be such as in her judgment will be best. It is to be such as will be best for them, having regard to all the circumstances, both of their necessities and the amount and sufficiency of the estate; and this proportion, which is to constitute what shall be best, is to be determined by the widow in the exercise of her judgment. It is her judgment that is to be called into exercise, and this excludes caprice, whim, and every merely arbitrary award; but whatever the judgment may be, and whatever discretion is involved in its exercise, it operates only upon the nature, form, character, and amount of the gift and provision intended for them. The fact of a gift and provision is pre-supposed, and stands on its own ground. Her judgment is not invoked as to that. The only ambiguity, in respect to whether there shall be a gift and provision or not, resides in the single word "request." Does that mean a wish of the testator which he

intended to be fulfilled out of the means which he had furnished to make it effectual, or does it mean a posthumous petition which the testator understood himself as addressing to the favor and good will of his sole legatee?

The situation of the testator at the time he framed these provisions is to be considered. He made his will October 8, 1878; he died the next day. It may be assumed that it was made in view of impending dissolution, in the very shadow of approaching death. There is room enough for the supposition that by this necessity the contents of his will were required to be brief; the conception of the general idea to give everything to his wife was simple and easily expressed, and capable of covering all other intended dispositions. The time and the circumstances, perhaps, disabled him from specifying satisfactory details concerning a provision for his mother and his sister, but he did not forget that he owed them care and protection. That care and protection, therefore, he recommended to his wife as his legatee; but he was not satisfied with that; he wished that care and protection to be embodied in a gift and provision for them out of the estate which he was to leave to her. He therefore requested her to make it, and that request he addressed to his legatee and principal beneficiary as expressive of his will that a gift and provision for his mother and sister should come out of it. His legacy to them was part of his legacy to her. All other particulars, as to its form and amount, he was willing to leave, and did leave, to be determined by his widow in her judgment of what would be best for his beneficiaries, so as to insure them that care and protection for which he was providing.

The substance of the bequest was his own; the form of it, shaped only by the declared purpose of his bounty, he was willing to leave to the judgment of his wife. The alternative that such discretion should assume the power to disappoint his dispositions evidently was not present in his thoughts, as it is not implied in his words.

The language of the testator immediately succeeding that under consideration throws some light on the meaning

of the words in dispute. He says: "I also request my dear wife to make such provision for my daughter Helen, wife of Crittenden Thornton, and Carrie, as she may in her love for them choose to exercise." These were the daughters of the wife as well as of the testator, as it is to be inferred from the fact that he refers the whole subject of any provision for them to her love, and the provision which he requests in their behalf is to be not such "as in her judgment will be best," but only such "as she may in her love for them choose to exercise," leaving the whole question of a provision subject to the exercise of the legatee's choice, which the testator was quite willing to adopt as the dictate of the love of a mother for her children.

It is also to be assumed that the circumstances and situation of his mother and sister were remembered by the testator in the act of making his will; that they were separated from his personal care by a wide distance; that his mother was a widow, and had nearly attained the age of three score years and ten; that even before the death of his father her health was feeble, and that since, she had been an invalid, enduring much sickness and suffering, requiring constant medical attendance, and the nursing and care of her daughter, who had always resided with her; that except the lot in Greenwood cemetery, where her husband was buried, she owned no real estate, and had no income except the interest on \$15,000, which had been advanced to the testator himself by his father as a loan many years previously, and on the income from which the mother and daughter were obliged, with great economy and self-denial, to maintain themselves in very straitened circumstances. A recollection of their necessities, as well as natural love and affection, must have inspired that sentence of his will by which the testator recommended to his widow the care and protection of his mother and sister, giving commanding weight and solemnity to the accompanying request "to make such gift and provision for them as in her judgment will be best;" for he also well knew that such a provision, sufficient for their comfort and inde-

pendence, would not sensibly diminish the abundance of the legacy to his wife out of which it must issue.

It is an error to suppose that the word "request" necessarily imports an option to refuse, and excludes the idea of obedience as corresponding duty. If a testator requests his executor to pay a given sum to a particular person, the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all of his just debts, and those of a firm for which he was not liable, should be paid as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter. (*Burt v. Herron*, 66 Penn. St. [16 P. F. Smith], 400.) And in such a case as the present, it would be but natural for the testator to suppose that a request, which, in its terms, implied no alternative, addressed to his widow and principal legatee, would be understood and obeyed as strictly as though it were couched in the language of direction and command. In such a case, according to the phrase of Lord Loughborough in *Malim v. Keighley* (2 Ves., Jr., 333, 529), "the mode is only civility."

But it is also argued that the trust sought to be established under this will in favor of the complainants is incapable of execution by reason of the uncertainty as to the form and extent of the provision intended, and because it involves the exercise of discretionary power on the part of the trustee which a court of equity has no rightful authority to control. We have seen that whatever discretion is given by the will to the testator's widow does not affect the existence of the trust. That discretion does not involve the right to choose whether a provision shall be made or not; nor is there anything personal or arbitrary implied in it. It is to be the exercise of judgment directed to the care and protection of the beneficiaries by making such a provision as will best secure that end. There is nothing in this left so vague and indefinite that it cannot, by the usual

processes of the law, be reduced to certainty. Courts of common law constantly determine the reasonable value of property sold, where there is no agreement as to price, and the judge and jury are frequently called upon to adjudge what are necessities for an infant or reasonable maintenance for a deserted wife. The principles of equity and the machinery of its courts are still better adapted to such inquiries. In the exercise of their discretion over trusts and trustees, it is a fundamental maxim that no trust shall fail for want of a trustee, and where the trustee appointed neglects, refuses, or becomes incapable of executing the trust, the court itself in many cases will act as trustee. In *Thorp v. Owen* (2 Hare, 607, 610), Wigram, V. C., said: "Whatever difficulties might originally have been supposed to exist in the way of a court of equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a court of equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance and advancement, provision, or other like indefinite expression, applicable to a fund larger confessedly than the party entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person." And in *Foley v. Parry* (2 Myl. & K. 138), where the words of a will were "and it is my particular wish and request that my dear wife and A. will superintend and take care of the education of D. so as to fit him for any respectable profession or employment," it was held that a charge was created on the interest taken by the testator's widow which could be made effectual by a court of equity.

It is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion as to the way in which they exercise the power, so that if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the maintenance, but will leave it to the trustees.

But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real, or personal security, and the trust fund is outstanding upon any hazardous security. (Lewin on Trusts, c. 20, § 2, 402, 403, 4th Eng. ed.)

In the case of *Costabadie v. Costabadie* (6 Hare, 410, 414), Vice-Chancellor Sir James Wigram said: "If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle or any authority upon which the court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave or intended that he should have—that is, so much as in the honest and reasonable exercise of that discretion he is entitled to. That is the measure of the legacy." But it is always for the court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly, and in good faith. (*In re Hodges, Davey v. Ward* (L. R. 7 Ch. Div. 754.) Plainly, if the trustee refuses altogether to exercise the discretion with which he is invested, the trust must not on that account be defeated, unless by its terms it is made dependent upon the will of the trustee himself.

On the whole, therefore, our conclusion is that each of the complainants in these bills is entitled to take a beneficial interest under the will of David D. Colton, to the extent, out of the estate given by him to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. It will be the duty of the court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be

suitable and best under the circumstances, and all particulars and details for securing and paying it.

The decrees of the Circuit Court are accordingly reversed, and the causes remanded with directions to overrule the demurrers to the several bills, and to take further proceedings therein not inconsistent with this opinion; and it is so ordered.

Precatory Words, or Words of Entreaty, Recommendation, etc.—

The principal case is an illustration of the well established rule that an absolute devise or legacy accompanied by words expressing a wish and desire that the donee shall devote either the whole, or some ascertainable portion thereof, to the benefit of another person, raises a trust in favor of the latter. *Handley v. Wrightson*, 60 Md. 198; s. c. 8 Am. Prob. Rep. 530, n.; *Williams v. Worthington*, 49 Md. 572; *Loring v. Loring*, 100 Mass. 840; *Warner v. Bates*, 98 Mass. 274; *McKee v. Means*, 34 Ala. 349; *Harrison v. Harrison*, 2 Gratt. 1; *Carson v. Carson*, 1 Ired. Eq. 329; *Collins v. Carlisle*, 7 Mon. B. 14; *Lines v. Darden*, 5 Fla. 51; *Dresser v. Dresser*, 46 Me. 58; *Bull v. Bull*, 8 Conn. 47; *Ericson v. Willard*, 1 N. H. 217; *Cole v. Littlefield*, 35 Me. 439; *Chase v. Chase*, 2 Allen, 101; *Ward v. Peloubet*, 2 Stockt. Ch. 305; *Lucas v. Lockhart*, 10 Smedes & M. 466. But see *Ellis v. Ellis*, 15 Ala. 296; *Hill on Trustees*, 78; *Pomeroy's Equity*, §§ 1014, 1017; *Perry on Trusts*, § 112 *et seq.*; *Major v. Herndon*, 78 Ky. 128; *Cresswell v. Jones*, 68 Ala. 420; *Negroes v. Plummer*, 17 Md. 165; *Cruwys v. Colman*, 9 Ves. 319; *Hiersen v. Garnet*, 2 Bro. Ch. 38, 226.

Trusts of this character have been raised by expressions of hope, *Harland v. Trigg*, 1 Bro. Ch. 142; or even of belief, that the donee would so apply the gift. *Paul v. Compton*, 8 Ves. 380.

And the same construction is placed upon words of recommendation, *Tibbits v. Tibbits*, Jacob, 317; or of entreaty. *Prevost v. Clarke*, 2 Madd. 458.

In *Robinson v. Smith*, 6 Madd. 194, the words "of course the legatees will give;" in *Parsons v. Baker*, 18 Ves. 476, the expression "not doubting;" in *Bardswell v. Bardswell*, 9 Lim. 323, "well knowing;" in *Barnes v. Grant*, 2 Jur. N. S. 1127, "under the firm conviction;" and in *Macnab v. Whitbread*, 17 Beav. 299, "having full assurance and confident hope," have all been similarly held to create precatory trusts.

An early case in Georgia, *Hunter v. Sternbridge*, 12 Ga. 192, seems to carry the rule to its furthest limits in giving a like effect to the sentence, "I also allow my son to give her a support off my plantation during her life."

But it is futile to multiply examples, for the point really to be determined in each case is, whether the testator intended to impose an obligation upon the legatee to carry his wishes into effect, or whether, having expressed his wishes, he intended to leave it to the legatee to act upon them or not at his own discretion. See note to *Knox v. Knox*, 4 Am. Prob. Rep. 55, and authorities there cited.

And in determining this question, each case is a law unto itself. The intention of the testator cannot be gathered from any one phrase or expression, nor be determined by the construction placed upon like expressions in adjudicated cases. The immediate context and all within the four corners of the instrument should be taken into consideration. *Bacon v. Ransom*, 139 Mass. 117; *Spooner v. Lovejoy*, 168 Mass. 533; *Biddle's Appeal*, 80 Pa. St. 258; *Van Amee v. Jackson*, 85 Vt. 177; *Negroes v. Plummer*, 17 Md. 165; *Brunson v. King*, 2 Hill. Ch. 490; *Eaton v. Watts*, Law R. 4 Eq. 151.

It is requisite that both the subject and object of bequest should be set forth with certainty, or that they should be ascertainable. For where it remains uncertain what persons the testator intended to benefit, or where he has left undefined the amount of property which is to be appropriated to their use, as for example, "the surplus" unexpended on the death of the legatee; it is strong evidence that compliance with his wishes was left to the discretion of the first legatee. *Morice v. Durham*, 10 Ves. 536; *Harper v. Phelps*, 21 Conn. 259; *Hood v. Oglander*, 34 Law. J. Ch. 528; *Tolson v. Tolson*, 10 Gill. & J. 150; *Harlan v. Trigg*, 1 Bro. C. C. 142; *Meredith v. Heneage*, 1 Lim. 542; *Knight v. Boughton*, 11 Clark. & F. 513; *Cowman v. Harrison*, 10 Hare, 284; *Palmer v. Simmonds*, 2 Dru. 221; *Smith v. Bell*, Mart. & Y. 302; *Pennock's Estate*, 8 Harris, 268; *Constable v. Bull*, 3 De Gex & S. 411; *Perry on Trusts*, § 114, n.; *Hill on Trustees*, 119; *Beach on Wills*, § 218.

Thus, where the testator wrote, "I only make this request of her [his wife], and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz., that in the event she should marry again she will see that the interests of our children in said property are protected," the court held that for want of certainty as subject of devise, no precatory trust in favor of the children was created in the property. *Sale v. Thornberry* (1887), 86 Ky. 266, distinguishing *Bohon v. Barrett*, 79 Ky. 378, in which although the words were precatory a specific amount was named, to wit, ten thousand dollars.

In South Carolina, New Jersey, New York, Pennsylvania and Connecticut, the rule is strictly construed. *Lesesne v. Witte*, 5 S. C. 450; *Van Dyne v. Van Dyne*, 14 N. J. Eq. 397; *Foose v. Whitmore*, 1 Am. Prob. Rep. 577; *Willets v. Willets*, 35 Hun, 401; *Gilbert v. Chapin*, 19 Conn. 351; disapproving *Bull v. Bull*, 8 Conn. 47; *Pennock's Estate*, 8 Harris, 268,

280; *Hopkins v. Glutt*, 111 Pa. St. 287; *Bowlby v. Thunder*, 105 Pa. St. 173; *Burt & Herron*, 86 Pa. St. 400.

And generally, both in England and in the American States, the tendency is to narrow its application. *Bispham's Equity*, § 72; *Stead v. Mellor*, 5 Ch. Div. 227; *Parnall v. Parnall*, 9 Ch. Div. 96; *Irvine v. Sullivan*, Law R. 8 Eq. 678; *Eaton v. Watts*, Law R. 4 Eq. 155; *Brook's Will*, 84 Law J. Ch. 616. See, also, *Bernard v. Minshull*, John, 276; *Shovelton v. Shovelton*, 32 Beav. 143; *Proby v. Landor*, 28 Beav. 504; *Ward v. Gray*; 26 Beav. 485; *Gully v. Crego*, 24 Beav. 185; *Constable v. Bull*, 3 De Gex & S. 411; *Williams v. Worthington*, 49 Md. 572; *Cockrill v. Armstrong*, 31 Ark. 580; *Warner v. Bates*, 98 Mass. 274; *Collins v. Carlisle*, 7 Mon. B. 13; *Hunt v. Hunt*, 11 Nev. 442; *Dresser v. Dresser*, 46 Me. 48; *Rhett v. Mason*, 18 Gratt. 541; *Crump v. Redd*, 6 Gratt. 373; *Ellis v. Ellis*, 15 Ala. 296. See, also, as to the restrictions and objections to the doctrine, *Hoover v. Lovejoy*, 108 Mass. 529; *Ingram v. Frayley*, 29 Ga. 553; *Young v. Young*, 68 N. C. 309; *Tolson v. Tolson*, 10 Gill. & J. 159; *Briggs v. Penny*, 8 Macn. & G. 546, 554; *Meredith v. Heneage*, 1 Sim. 542; *Beach on Wills*, § 220.

See, also, *Anderson v. Hammond*, 1 Am. Prob. Rep. 545; *Foose v. Whitmore*, Id. 577; *Olliffe v. Wells*, 2 Id. 590; *Bacon v. Ransom*, Id. 364, and the note; *Mills v. Newberry*, 5 Id. 318; *Jones v. Jones*, 124 Ill. 254; *In re Adams and the Kensington Vestry*, 27 Chan. Div. 394; s. c. *Brett's Leading Cases in Equity*, 13, and the learned editor's annotation.

GAY vs. GAY.

(84 Alabama, 38.)

REVOCATION BY MARRIAGE AND BIRTH OF A CHILD.

The implied revocation of a will by subsequent marriage and birth of issue, under the statute of Alabama (Code of 1886, § 1953), is based on a presumed alteration of intention, arising from changed circumstances, new relations and duties; and the presumption is made conclusive, unless provision is made for the after-born child, or an intention not to make provision is shown in the will; but the presumption may be rebutted by a settlement providing for the child, made after as well as before the execution of the will.

APPEAL from the Probate Court of Montgomery. The opinions state the case.

Graves & Blakey and *Thomas H. Watts*, for the appellants.

Shaver & Hutcheson, for the respondents.

CLOPTON, J. Section 2282 of the Code of 1876 (being section 1953 of Code, 1886), provides : " If, after making of any will, disposing of his whole estate, the testator marry, and have issue of such marriage, born, either in his lifetime or after his death, and the wife or such issue is living at the death of the testator, such will must be deemed revoked, unless provision has been made for such issue by some gift or settlement ; or unless such issue has been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision ; and no other evidence can be received for the purpose of rebutting the presumption of such revocation." Julius B. Gay, being then a widower, made his will August 3d, 1884, devising and bequeathing his real and personal property to his six children born of a deceased wife. In February, 1885, he married a second time, and a few days prior to this marriage, he and his intended wife made an ante-nuptial contract, the nature and provisions of which will be considered hereafter. The testator died December 31st, 1887, leaving his wife and one child born of this second marriage surviving him. The question presented is, whether on these facts, the will shall be deemed revoked.

The case brings before the court, for the first time, the construction and effect of the statute. It should be construed in reference to the state of the law as it existed at the time of the formation and adoption of the statute. The established doctrine, which was borrowed by the English courts from the civil law, was, that marriage and the birth of a child revoked a prior will, whether of real or personal estate, or both, where the entire estate was disposed of, and

no provision made for the wife and child by the will, or otherwise. As to the theory of the doctrine and the principle on which it rested, discrepant views were entertained, the result being conflicting inferences and conclusions in respect to the time the provision for the wife and child should be made in order to prevent a revocation. The temporal courts generally sustained the view, that the revocation was the consequence of a rule of law, grounded on a tacit condition annexed to the execution of the will, that an entire alteration of the state of circumstances under which the will was made, produced by subsequent marriage and birth of a child, should operate a revocation. On the other hand, the ecclesiastical courts maintained the view, that the implied revocation was founded on the presumed intention of the testator to revoke his will, arising from the change of the state of circumstances under which it was made, and from the new social and moral duties resulting therefrom. Lord Mansfield sustained the rule upheld by the ecclesiastical courts—a presumed alteration of intention—which, Chancellor Kent, considered “the higher and firmer ground.” (4 Kent [12 Id.], 575; *Brady v. Cubit*, Doug. 31.)

The present statutory provisions were first introduced into the Code of 1852, being section 1957. It is not a legislative affirmation *in toto* of the doctrine as it existed prior to, and independent of the statute. By the statute, the wife or the child must be living at the death of the testator, while by the common law, the death of the child before the death of the testator did not revive a will revoked by marriage and the birth of the child. By the English law, provision must be made for both wife and child, while the statute requires provision shall be made only for the child. In these respects the Alabama statute modifies the doctrine as established by both the temporal and ecclesiastical courts in England. It was framed and enacted in the light of the conflicting opinions held by these courts in regard to the principle on which the doctrine was grounded, and of the inconsistent and antagonistic results produced thereby.

After having provided, that marriage and birth of a child must be deemed a revocation of a prior will, if the wife or child is living at the death of the testator, unless provision has been made for the issue by gift or settlement, or in the will, or such issue is mentioned therein in such a way as to show an intention not to make such provision, the statute declares: "No other evidence can be received for the purpose of *rebutting the presumption* of such revocation." The effect is to declare the particular kind and character of evidence, which shall be requisite to rebut the presumption of revocation, and to abrogate the rule sustained by some of the courts, that any evidence was admissible which showed a contrary intention. In respect to the statute of New York, of which our statute is a substantial copy, Chancellor Kent says: "This provision is a declaration of the law of New York, as declared in *Brush v. Wilkins*, with the additional provision of prescribing the exact extent of the proof which is to rebut the presumption of revocation, and thereby relieving the courts from all difficulty on that embarrassing point." The law, as declared in the case referred to, was, that the presumptive revocation may be rebutted by circumstances. (*Brush v. Wilkins*, 4 John. Ch. 506; 4 Kent, 12 ed. 578.) By clear implication the statute declares, as the law of this State, the rule maintained by the ecclesiastical courts and approved by Lord Mansfield, which placed the doctrine of implied revocation on a presumed alteration of intention, arising from a change of circumstances, and from new relations and duties, with the modification, that the presumption of revocation shall be conclusive, unless provision is made for the after born child, or an intention not to make such provision is shown, as required by the statute.

From the doctrine that the revocation was a consequence of a tacit condition annexed to the execution of the will, it followed that a provision for the wife and child by a settlement made after the will, did not prevent a revocation. (1 Jarman on Wills [Ran. & Tal. Ed.], 276.) The statute having impliedly abrogated this rule, or having declared that it shall not be regarded in this State, the conclusion

following from the rule falls with it, and under the statute, a settlement providing for the child, made after the execution of the will, is sufficient to rebut the presumption of revocation. We can conceive no adequate reason on which to base an inference, that the legislature intended that provision, by gift or settlement should be made *before* the child was born, and *when* a second marriage may not, and probably could not, have been reasonably contemplated.

2. The remaining question is, whether the ante-nuptial settlement is a provision for the child in the meaning of the statute? A construction should not be placed on the statute which will impair, or interfere, with the right of the testator to absolutely dispose of his property as he may deem proper, further than its terms, expressly or by clear implication, require to accomplish the intended ends. It does not operate to deprive the testator of the right and power to determine the nature and extent of the provision, which he will make for those having claims on his natural affections. It does not undertake to declare the measure and extent of the provision which the testator must make for the after born child. He may make no provision whatever, provided, the child is mentioned in the will in such a way as to show an intention not to make any provision. The requirements of the statute are satisfied, if it be shown by a provision, made by gift or settlement, or by mention of the issue in the will, that such issue was fully in his mind and contemplation, and that he acted deliberately on the matter of making provision for such issue. In *Kennebel v. Scrafton* (2 East. 529) Lord Ellenborough said: That, the doctrine of implied revocation only applies where there is an entire disposition of the whole estate, and the wife and children are *wholly* unprovided for. Under the statute, the testator has discretion and capacity to determine the nature and extent of the provision, when made by gift or settlement, the same as when made in the will, with the qualification, that the gift or settlement will be insufficient, if by reason of gross inadequacy, it shall be an equivalent of no provision. He may make no provision whatever,

but in such case, the intention must be shown by mention of the issue in the *will*. It was deemed that the issue had sufficient security resting on parental affection, that the father's power of disposition would not be abused.

By the ante-nuptial settlement, the testator, in consideration of the intended marriage and of the relinquishment by his intended wife of all claim which she may, or might become entitled to, by reason of the marriage, upon his real and personal property conveyed to her, real and personal property upon trust, that she should hold the same during her natural life or widowhood, with remainder to any issue of the marriage living at the time of the testator's death, or at the time of her re-marriage, and should such issue die unmarried, then to the heirs at law of the testator. In *ex parte* Earl Ilchester (7 Ves. 348), on the marriage of the testator subsequently to making his will, a settlement was made in favor of his wife, by which provision was also made for the children of the intended marriage. Lord Chancellor Eldon held that the wife and children being provided for, and there being children of the former marriage, the will was not revoked by the second marriage and the birth of children. It has also been held, that a marriage settlement, by which an estate is secured to the wife during her life, with remainder to the children of the intended marriage, is a sufficient provision for wife and children to rebut a presumptive revocation. (*Talbot v. Talbot*, 1 Hag. 299.) A provision creating a trust for the child, which a court of equity would enforce, is a provision for the benefit of the child, such as falls within the words, as well as the spirit of the statute. *Walker v. Hall* (34 Penn. St. 483): Clearly, provision is made by the ante-nuptial settlement for the child, the issue of the second marriage. The testator, at the time he made the ante-nuptial settlement, had fully in mind and contemplation the probability of issue by his intended marriage, acted deliberately on the matter, and determined the nature and extent of the provision, which he would make for such issue. If the will were revoked, the ante-nuptial settlement would remain in force, and the child

born of the second marriage would receive the property conveyed by the settlement.—the provision made by the testator—in addition to an equal distribution in his estate with the children of the first marriage. A construction should not be placed on the statute, which would result in such inequality and injustice, contrary to the intentions of the testator. We regard the ante-nuptial settlement, which *prima facie* makes a substantial provision, a sufficient provision for the after born child, in the meaning of the statute, to prevent a revocation of the will.

Reversed and remanded.

SOMERVILLE, J.—The construction of section 1953 of the present Code (Code, 1876, § 2282) does not seem to me to be involved in any doubt or embarrassment, by reason of the language in which it is expressed.

My analysis of the section is briefly this: The revocation of a testator's will, which is declared to be effected by his marriage and subsequent birth of issue, can take place only in the following concurring contingencies: (1) The making of a will disposing of substantially his *whole* estate; (2) The testator's subsequent *marriage*; (3) Birth of *issue* from such marriage at any time, whether *before* or *after* the testator's death; (4) The survival of *either* the wife, or such issue after the testator's death.

If these four incidents occur, the will is totally revoked, *except* in the following cases, which operate to prevent revocation: (1) Where the testator, in *his* will, *provides for such issue*, or makes mention therein of such issue so as to show an intention, express or implied, *not to make such provision*; (2) Unless before death he makes provision for such issue by some *gift*, or *settlement*, whether before, contemporaneous with, or *after* the making of his will.

The only mode of rebutting the presumption of revocation raised by the statute is by evidence of a provision having been made in one of the two modes last mentioned. No oral declarations of the testator are admissible in evidence for the purpose of raising a contrary intention.

Section 1955 of the Code (1886) has reference to a partial revocation of the will, so far as to allow a child born after the making of the will to take as in case of intestacy, and does not affect the question before us.

These conclusions seem to me to clearly follow from the obvious meaning of the words employed in the statute, which leave but little room for construction.

I concur in the view of Judge Clopton that the antenuptial settlement made, in this case, by the testator for the child afterwards born, was a sufficient provision to prevent the revocation of the will, which would otherwise have followed under the operation of the statute.

See, also, *Milburn v. Milburn*, 8 Am. Prob. Rep. 544; *Swan v. Hammond*, 4 Id. 584; *Baldwin v. Spriggs*, 5 Id. 85, and the note.

HADDOCK *vs.* BOSTON & MAINE RAILROAD.

[146 Massachusetts, 155.]

LIMITATION OF TIME WITHIN WHICH A WILL MAY BE ADMITTED TO PROBATE.

A will devising real estate may be admitted to probate at any time after the death of the testator.

APPEAL by the Boston & Maine Railroad from a decree entered November 16, 1885, admitting to probate the will of one who died in 1822.

S. Lincoln, for the appellant.

Benjamin F. Butler and *P. Webster*, for the executor.

DEVENS, J. The first question discussed by the appellant is whether the Probate Court has authority, as matter of law, to admit a will to probate sixty-three years after the death of the testator, and incidentally whether there is any limit of time after the death of the testator subsequent to which the court has no such authority.

In *Shumway v. Holbrook* (1 Pick. 115, 117) the question was whether a will not admitted to probate was admissible in evidence. It was held that it was not, but it is said: "If a will can be found, it may be proved in the Probate Court at any time, in order to establish a title to real estate. It differs from an administration of personal property, which cannot be originally granted upon the estate of any person after twenty years from his decease." In the course of the argument Mr. Justice Jackson alluded to a case in Essex County perhaps thirty years before, where it was found that a widow "must hold land under the will which had not been proved." The will having been offered for probate, the judge of probate declined to allow it, as more than twenty years had elapsed since the death of the testator, and on appeal his decision was reversed and the will admitted to probate. The research of the counsel for the defendant has established that the case thus alluded to was that of *Bourne v. Greenleaf* (Essex, 1802; s. c. cited 1 Pick. 117, note); and has supplied us with as satisfactory an account of it, drawn from the papers on file, as they will afford. It is a case to which some weight must be attached, as it brought into question directly the authority of the Court of Probate, and the appeal was to the full bench of the Supreme Court, which reversed the original decree. While no opinion appears to have been written, it could not but have been a carefully considered case, as it reversed the opinion of the judge of probate as to the extent of his jurisdiction. The will thus admitted to probate was so admitted thirty-six or thirty-seven years after its date. How long after the death of the testator does not clearly appear, although some of the papers found indicate that it was more than thirty years after.

In *Marcy v. Marcy* (6 Met. 360, 370) the question was whether there was sufficient evidence that a will which became operative forty-three years before had been admitted to probate so that it could be read in evidence. The court held that there was such evidence, adding, "On evidence like the present, it would be the duty of the Probate Court to establish the will, if, for want of form, the probate should have been considered so defective that the will had been rejected as evidence in its present state."

In *Waters v. Stickney* (12 Allen, 1), where it was held that the Probate Court, fourteen years after admitting a will to probate, might admit to probate a codicil written upon the same leaf, which had escaped attention and was not passed upon at the time of the probate of the original will, it is said by Mr. Justice Gray, citing the above cases, "It has been directly adjudged by this court that a will may be proved even thirty years after the death of the testator, although original administration could not by statute be granted after twenty years;" and again, "If no will had been proved, the lapse of time would not prevent both will and codicil from being proved now."

While it is true that in neither of these cases has it been decided that a will disposing of lands can be admitted to probate after sixty years, yet there is no suggestion in any of them that there is any limitation of time to such proof, and the language used is quite explicit to the contrary. In view of the decisions made, and the repeated expressions directly relevant to the cases considered used in argument by judges of this court, we cannot treat this inquiry, as the defendant desires we should, as practically a new question. We must deem it one that has been fairly passed upon and decided.

It may be that the inconveniences which might arise from the probate of a will many years after the death of the testator are such that a statute limiting the period might be properly enacted. That course has in some States been adopted. (Conn. Gen. Sts. 1875, tit. 18, c. 11, § 11. Maine Rev. Sts. c. 64, § 1). But statutes of limitation are

arbitrary, and the considerations which apply to positive laws of this character are legislative rather than judicial. In every instance where a great length of time has elapsed after the death of a testator, possessory titles may have been acquired which will prevail against the record. What is due to the just rights of the devisees is to be considered with reference to other rights of property, or to the repose of the community, but such considerations belong to the domain of legislation.

So long as one can produce the evidence necessary to obtain the probate of a will, we can see no legal reason why one who relies upon it should not be allowed to prove it as he would be permitted to prove a deed, however ancient, under which he claimed a title. The fact that he could not offer in evidence a will not admitted to probate, as he might an ancient deed, would certainly afford no reason why its authenticity should not be established in the Probate Court by its regular course of procedure.

The appellant further contended that the jury ought not to have been allowed, in determining the question whether the testatrix was a widow and thus competent to make a will as the law stood in 1807, to consider the fact that she actually executed a paper purporting to be a will devising land as any evidence that she had legal capacity so to do. This fact, in connection with the other facts proved, was competent to be considered. There was no ruling that alone it would have been sufficient to establish her legal capacity, that is, that she was at the time a widow. There was evidence of reputation that the husband of the testatrix died soon after their marriage; that a deed was made to her on December 21, 1801, of the very land which she undertook to dispose of by will, in which she was described as "Sarah Pendergrass, widow," which deed was found among her papers; and that she executed the will by the same name as that recited in the deed in which she was described as widow, although that word is not appended to her name in the will. The act done by her of disposing, or assuming to dispose, of her property, which she could only

lawfully do if a widow, was an assertion of her status, and thus of her legal capacity, made in an important transaction, which might properly have been considered in connection with the other evidence.

The conclusion we have reached renders it unnecessary to decide whether the appellant was lawfully entitled to appeal. Other exceptions taken by it were waived in this court.

Cause to stand for further proceedings.

In *Foote v. Foote*, 61 Mich. 181, 192, *et seq.*, it is held that one who has the custody of a will, or knows of its existence, ought, in justice to all parties concerned, with reasonable diligence, after the death of the testator, to offer it for probate, and that where a period of fourteen years is allowed to elapse, such a person will forfeit his claim under a will then for the first time produced and probated.

DICKEY *vs.* VANN.

[81 Alabama, 425.]

ANCILLARY PROBATE OF A FOREIGN WILL.—PRESUMPTION FROM LAPSE OF TIME.

When a will, executed in another jurisdiction, where the testator lived and died, has been admitted to probate there, ancillary probate of it may be granted here, on the production of a transcript properly certified (Code, § 2313); and neither the failure to give notice to parties in interest, nor the fact that the proof of execution and attestation, as shown by the transcript, is defective, renders such ancillary probate void. The will being regular on its face and appearing to have been attested by the requisite number of witnesses, the original probate, though irregular and made on defective proof, having stood unquestioned for over forty years, all presumptions will be indulged in its favor.

APPEAL from the Probate Court of Madison County.

Watts & Sons, for the appellants.

R. C. Brickell, for the respondents.

SOMEVILLE, J. 1. The probate of a will has often been held by this court to be in the nature of a proceeding *in rem*—operating upon the thing itself and determining its *status*. Being an adjudication upon the *status* of the particular subject matter, like other judgments *in rem*, when pronounced by a tribunal of competent jurisdiction, it is binding upon all other courts, and as commonly said, concludes the world. It is only when there is an intervention of parties litigant, and an actual contest ensues, that it assumes the nature of a proceeding *inter partes*. (*Deslonde v. Darrington*, 29 Ala. 92; *Kempe v. Coons*, 63 Ala. 448; *Martin v. King*, 72 Ala. 354; *Blakey v. Blakey*, 33 Ala. 611; *Freeman on Judg.* § 608; 1 *Greenl. on Ev.* § 550; *Estoppel and Res Adjudicata* [Herman], Vol. 1, § 293.)

2. It necessarily follows from the foregoing principle that if a will be proved in a court of probate, which in this State has original, general and unlimited jurisdiction of the probate of wills, and such court has jurisdiction of the particular case, a failure to give the requisite statutory notice to the widow and next of kin, of the application for such probate, does not render void the judgment of the court establishing the probate. In such case the judgment being designed to establish the *status* of a thing, binds the *res* even in the absence of any personal notice to interested parties. (*Freeman on Judgments*, §§ 606, 608.) The defect is a mere irregularity rendering the judgment voidable at the instance of any person entitled to, and failing to receive such notice, his remedy being to move the Probate Court to set aside its improvident judgment of probate, or to procure himself to be made a party to the proceeding by petition, and sue out an appeal, or to file a bill in chancery to contest the validity of the will within the time prescribed

by section 2336 of the present Code (1876) of Alabama. (*Hall v. Hall*, 47 Ala. 290; *Goodman v. Winter*, 64 Ala. 410; *Lovett v. Chisholm*, 30 Ala. 88; *Lees v. Browning*, 15 Ala. 495; *Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587; *Brock v. Frank*, 51 Ala. 85; Code, 1876, §§ 2336, 2376; *Satcher v. Satcher*, 41 Ala. 26.)

3. Nor has it ever been supposed, as suggested by counsel, that there was wanting in these established modes of judicial proceeding that "due process of law" guaranteed by our constitution to every person, and without which he can not be deprived of his property. These are the settled rules and modes applicable to that particular class of proceedings *in rem* to which this case belongs, and are deemed amply sufficient for the protection of the rights of all whose interests may be threatened with prejudice for want of notice before the rendition of the original judgment declaring the *status* of the will. With these modes of redress open before him it can not be said that any person is without his day in court. (*Ex parte McDonald*, 76 Ala. 603; 1 Greenl. Ev. § 518; Freeman on Judg. §§ 606-8, 611-12; 1 Herman's Estoppel, § 293.)

4. We can not see that this rule is varied where a foreign will, or one admitted to probate in another State, is admitted to probate in a court of competent jurisdiction in this State, on a properly certified copy of the record, verified in accordance with section 2313 of the Code of 1876, even where the devise made by it is of real property. The probate of the will of William Cloud in this case, which is sought to be collaterally attacked, was made under this statute, and purports to affect realty situated in Madison county in this State. It is true that a will, in order to convey real property, must be executed and attested in accordance with the law of the State where the property is situated. So, likewise, as to the testamentary disposition of this particular kind of property, the *lex loci rei sitæ* also governs as to the power and capacity of the testator, while, as to personal property, the *lex domicilii*, or law of the testator's domicile, prevails. (*Varner v. Bent*, 17 Ala. 286;

Brock v. Frank, 51 Ala. 85.) Nor can it be denied that the statute which was in force in this State, at the time of the testator's death in 1846, is to govern in this case, requiring, as it did, that the testator should have been twenty-one years of age, and that his will should have been signed by him, and attested by three, instead of two witnesses as under our existing statute, who must have signed their names in his presence. (Clay's Dig. § 1, p. 596.)

5. The probate of Cloud's will relied on by the appellee's counsel is the one made by the Probate Court of Madison county, in this State, on December 5th, 1884. This was allowed on a certified transcript of the County Court of Davidson county, Tennessee, a tribunal which is shown to have had original and exclusive jurisdiction of the probate of the wills of deceased resident testators. No reliance is placed upon the fact that a transcript of the foreign probate of the will was filed and recorded in the Probate Court of Madison county in the year 1852. This alone is admitted to be immaterial and without any legal efficacy in its bearing on the questions arising for decision in this case. (*Pope v. Pickett*, 51 Ala. 584.) The will on its face appears to have been attested by three witnesses, as required by the laws of this State at the time of the testator's death. The certificate of proof, as made by the Tennessee court, is admitted to be defective, as it appears in the transcript, in failing to show that each of the three witnesses attested the instrument in the presence of the testator. It is now contended that the decree of the Madison county Probate Court, of December 5th, 1884, which was made without notice to the next of kin, was absolutely void, for want of jurisdiction, and can be collaterally assailed. The statute, it is said, permits an ancillary probate of a foreign will on a certified transcript, where the testator was a non-resident, only where it appears that such will was "duly proved" in the court of the State where the probate was made. (Code of 1876, § 2313.) The proof of the execution here is defective, in failing to show that all of the attesting witnesses signed in the presence of the testator. It has been more than once

held in this State, that an ancillary probate of a will under this statute could be made without giving any notice of the proceedings to the widow or next of kin, the statute being construed not to require it. (*Brock v. Frank*, 51 Ala. 85; *Ward v. Oates*, 43 Ala. 515.) This principle, however, we do not deem of essential importance in this case. The proceeding, as we have said, being one *in rem*, the failure to give notice, however erroneous, does not render the probate void, so as to subject the judgment of the court to collateral attack. One of the very questions submitted to the Probate Court of Madison county was, whether the will of Cloud was shown to have been duly proved by the attesting witnesses at the time of the probate in the Tennessee court. In other words, it was called on to pronounce upon the sufficiency of the transcript as evidence to prove the validity and due authentication of the original probate. (*Goodman v. Winter*, 64 Ala. 410; *Brock v. Frank*, 51 Ala. 85.) As observed in *Brock v. Frank* (*supra*): "When this ancillary probable is sought, no question arises except as to the validity and authentication of the original probate. If that was granted by a tribunal of competent jurisdiction, and it is properly authenticated, the ancillary probate must be allowed." The evidence may not have been sufficient to justify the finding of the Probate Court. Its judgment, based on such evidence, may have been erroneous. But it cannot be reviewed in the manner here attempted. It is not void, and cannot be collaterally attacked. It is conclusive upon all concerned, even upon those having no notice of the proceeding, until set aside in some legitimate mode.

6. We might go further if necessary, and decide, that, in view of the testator's will appearing regular on its face—seeming to have been attested by the requisite number of witnesses—the defective probate will be deemed to have been cured by great lapse of time, having stood unquestioned for over forty years. No reason is perceived why the presumption, *omnia rite acta*, will not apply in a case of this kind. (*Jemison v. Smith*, 37 Ala. 185, 196; 2 Redfield

on Wills, 37-38; *Giddings v. Smith*, 15 Vt. 344; *Jordan v. Cameron*, 12 Ga. 267; 1 Greenl. Ev. § 21; *Matthews v. McDade*, 72 Ala. 377; *Gosson v. Ladd*, 77 Ala. 223.)

The probate of the will in controversy, which was made on December 5th, 1884, not being void, to say the least, no second probate of the same instrument in the same tribunal could properly be effected. The petition of the appellants, filed for this purpose, was therefore rightly disallowed and dismissed.

Judgment affirmed.

See, also, *Besançon v. Brownson*, 1 Am. Prob. Rep. 461; *Stark v. Parker*, Id. 550; *Caulfield v. Sullivan*, 2 Id. 43, and the note; *McCartney v. Osburn*, 5 Id. 594.

ROBISON vs. FEMALE ORPHAN ASYLUM OF PORTLAND.

[128 United States, 702.]

CONSTRUCTION OF A WILL.—LIFE ESTATE TO A WIDOW WITH REMAINDERS OVER TO THE TESTATOR'S SISTERS AND TO CERTAIN CHARITIES.

In construing a doubtful clause in a will regard ought to be had rather to the testator's intention as indicated by his language, than to formal rules of interpretation, however sound, or to the decided cases in point, however on all fours.

APPEAL from a decree of the Circuit Court of the United States for the District of Maine. ROBERT I. ROBISON, formerly of Portland, in the State of Maine, died on the 13th day of June, 1878, at that time a citizen of the State of New York and resident of Brooklyn, leaving a last will and testament, which was subsequently admitted to probate in the

Surrogate's Court of Kings County, New York, and duly recorded on December 27th, 1878. Letters testamentary thereon were on the same day issued and granted to Jane S. Robison, his widow, who alone qualified as executrix. The testator at the time of his death was seized of real estate in the city of Portland, and also possessed of a considerable amount of personal property.

The following was a copy of the will :

"I, Robert I. Robison, of Portland, in the State of Maine, being in a sound disposing mind and memory, do make and publish this my last will and testament. And, first, my will is that my executors see that my body be buried in a decent and proper manner in the family vault in the Eastern Cemetery in the city of Portland aforesaid. Secondly, I will that all my just debts be paid in full, and from the balance I will that with whatever property may be standing in my wife's, Jane S. Robison's, name, at the time of my death, that my executors make up said amount to the sum of eight thousand and five hundred dollars, it being the amount, or thereabouts, which she received from her father and mother's estates, it being my will that the principal shall be kept good to her and her heirs, but not the interest. This is to be in full for all claims she may have on my estate arising out of the use of her property. Thirdly, I further will that she may have the income of all my estate, she having the right to spend the same, but not to have it accumulate for her heirs. Fourthly, it is my will that if my sister, Ann Smith, wife of Jacob Smith, of Bath, in the State of Maine, and Eleonora Cummings Robison, wife of Thomas Weeks Robison, of Kingston, Canada West, be living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate as long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum, one-third of the income to the 'Widows' Wood Society, and one-third of the income to the Home for

Aged Indigent Women, all of the city of Portland and State of Maine. Lastly, I do nominate and appoint my wife, Jane S. Robison, and John Rand, Esq., to be my executors of this my last will and testament.

"In testimony whereof I have hereunto subscribed my name and affixed my seal this thirty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two.

"(S'd) ROBERT I. ROBISON. [L. S.]

"Signed, sealed, and declared by the said Robert Ilsley Robison to be his last will and testament in the presence of us, who, at his request and in his presence, have subscribed our names as witnesses hereto.

"CHARLES H. ADAMS.

"B. F. HARRIS.

"JASON BERRY."

On December 29, 1881, the present bill in equity was filed by Jane S. Robison, as widow and executrix, for the purpose of obtaining a construction of the will, the defendants being charitable institutions named therein, and the only other parties in interest, Ann Smith and Eleonora Cummings Robison, the persons mentioned in the fourth item of the will, having both died before the testator.

It was contended on the part of the complainant that, in consequence of the lapse of the devise and legacy to Ann Smith and Eleonora Cummings Robison, the bequest to the defendants never took effect, and that consequently the complainant was entitled to the estate absolutely, by virtue of the devise to her, or, in the alternative, because the testator had died intestate as to that part of the estate mentioned in the fourth subdivision of the will. The decree of the Circuit Court, however, was, "that the complainant is entitled only to the income of the estate during her natural life, and that the fourth subdivision of the last will and testament of the testator is operative and valid, and was so at the time the will took effect, and that the defendant cor-

porations acquired by virtue thereof the right, from and after the death of the complainant, to the perpetual income of the said estate." To review that decree the present appeal was brought.

Samuel B. Clarke, for appellant.

John Rand, for appellee, submitted on his brief.

MATTHEWS, J. It is now contended in argument on the part of the appellant, 1st, that the language of the third subdivision of the will, considered by itself, is sufficient to give to her the real estate in fee and the personal estate absolutely; 2d, that the bequest in the fourth subdivision of the will to Ann Smith and Eleonora Cummings Robison is contingent on one of them surviving both the testator and the complainant, and, as the event happened, never became vested; 3d, that the bequest to the defendants is dependent upon the vesting of the bequest to Ann Smith and Eleonora Cummings Robison, being affected by the same contingency, namely, one of them surviving the testator and the complainant; and, 4th, that if the interest of the complainant under the third subdivision of the will must be limited to a life estate, as the bequests contained in the fourth subdivision have lapsed, or cannot take effect, the testator died intestate in respect to that portion of his estate.

In support of the proposition that the bequest to the defendants must fall with that to Ann Smith and Eleonora Cummings Robison, counsel for the appellant rely upon the rule laid down by Mr. Jarman in the following language: "When a contingent particular estate is followed by other limitations, a question frequently arises whether the contingency affects such estate only or extends to the whole series. The rule in these cases seems to be that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that

estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and, therefore, appear not reasonably applied to the ulterior limitations. Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event for want of something in the will to authorize a distinction between them." (1 Jarman on Wills, 5th Am. Ed. by Bigelow, *830.)

But the rule referred to is one of construction merely, and intended only as a formula for the purpose of classifying cases in which the meaning is gathered from the language of the testator expressing such intention, and is not to be applied to instances in which it appears that the contingency is restricted to the immediate estate. The same author divides those instances into two other classes: "First. Where the words of contingency are referable to and evidently spring from an intention which the testator has expressed in regard to that estate by way of distinction from the others. Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series in the nature of remainders, but assume the form of substantive independent gifts." (Ibid. 831, 842.)

Under the second of these classes is ranged the case of *Boosey v. Gardener* (5 De G. M. & G. 122.) In that case, the testator bequeathed to his two sisters the interest of his Long Annuities for their lives, and, in case of one or both of their deaths before his, he gave the whole interest in Long Annuities to his brother for life; at his death (that is, the death of the brother), the testator gave half of the capital to his niece A., his brother's daughter, to help to bring her up, till she attained the age of twenty-one, then to receive half the capital; likewise, the testator bequeathed

to his nephew S., his brother's son, if not further family, his other half, in case of further family, to be divided between them, not dividing the half left to A. It was held by Turner, L. J., that the bequest to the niece and nephew was not contingent upon the death of the sisters in the testator's lifetime, although the preceding estate for life to the brother was.

But little aid, however, in such cases is to be derived from a resort to formal rules or a consideration of judicial determinations in other cases apparently similar. It is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention.

In applying this principle, the Supreme Judicial Court of Massachusetts, in the case of *Metcalf v. Framingham Parish* (128 Mass. 370, 374), speaking by Gray, C. J., said: "The decision of this question doubtless depends upon the intention of the testator as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." (*Ferson v. Dodge*, 23 Pick. 287; *Towns v. Wentworth*, 11 Moore P. C. 526; *Abbott v. Middleton*, 7 H. L. Cas. 68; *Greenwood v. Greenwood*, 5 Ch. D. 954.)

Looking into the present will, therefore, for that purpose, we find it evident that the testator did not intend by the third subdivision of his will to give to his widow an interest in his estate beyond her life. This conclusion is not based on any distinction between a bequest of the income of the estate and a bequest of the body of the estate itself; nor do we lay any stress on the declaration in that clause, "she having the right to spend the same, but not to

have it accumulate for her heirs," although that language does afford an indication in support of the conclusion. But whatever force, standing by itself, the third subdivision might have, it is clear that the testator intended, in the event that his sister Ann Smith and Eleonora Cummings Robison should survive both himself and his wife, that they should have an estate for life, beginning at the death of his widow. That would necessarily limit the widow's estate to her own life. But as the estate given by the fourth clause to Ann Smith and Eleonora Cummings Robison for their lives was contingent on the event that one or the other of them should be living at the death of the wife, the question remains whether that contingency also entered into the bequest in remainder to the defendants. The fact that Ann Smith and Eleonora Cummings Robison died before the testator, whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift. And this applies also whether the gift over of the legacy or share is to take effect on the death of the prior legatee generally or on the death under particular circumstances, and whether the legacy be immediate or in remainder. It was so held in *Willing v. Baine* (3 P. Wms. 113), where the bequest was to A, but if he died under twenty-one, to B.

In *Humberstone v. Stanton* (1 Ves. & B. 385, 388), it was said: "It seems formerly to have been a question whether a bequest over, in case of the death of the legatee before a certain period, could take effect where he died during the testator's life, though before the period specified. In the case of *Willing v. Baine*, legacies were given to children, payable at their respective ages of twenty-one; and if any of them died before that age, the legacy given to the person so dying to go to the survivors; one having died under twenty-one in the life of the testator, it was contended that his legacy lapsed, and did not go over to the survivors."

The argument was that the bequest over could not take place, as "there can be no legacy unless the legatee survives the testator, the will not speaking until then; wherefore this must only be intended where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one. It was, however, held, and is now settled, that in such a case the bequest over takes place."

It follows, therefore, that unless it appear on the face of the will that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift which, by reason of the contingency, has failed.

The scheme and intention, therefore, of the present will seems to us, considering the third and fourth subdivisions together, to be this: An estate for life to the testator's widow; an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent on one of them surviving the widow, with the ultimate remainder in fee as to the real estate and absolutely as to the personalty in the defendants. The language of the contingency in the fourth clause, in our opinion, affects only the intermediate life estate of Ann Smith and Eleonora Cummings Robison, it being, we think, the plain intention of the testator to give to his widow the estate in question only for her life, and not to die intestate as to any portion of the estate, and to limit the contingency only to the gift to Ann Smith and Eleonora Cummings Robison. It is true that the ultimate gift to the defendants is described as commencing "at their death," that is; at the death of Ann Smith and Eleonora Cummings Robison, but that language is evidently used only as indicating the expectation of the testator, which he would naturally indulge, that the beneficiaries named would live to receive the gift intended. Certainly those words are not to be construed so as to require that the gift to the defendants shall take effect at the death of Ann Smith and Eleonora Cummings Robison, irrespectively of the prior decease of the widow.

The limitations in the two subdivisions of the will are to be taken in connection with each other as a complete disposition in the mind of the testator of his estate, giving to the widow an estate for life, with an estate over for life to Ann Smith and Eleonora Cummings Robison, contingent upon one or the other of them surviving the widow, with the ultimate remainder to the defendants.

The decree of the Circuit Court is accordingly affirmed.

See, also, *Metcalf v. First Parish in Farmingham*, 1 Am. Prob. Rep. 11; *Rood v. Hovey*, 3 Id. 402, and the note; *Gibbens v. Gibbens*, 5 Id. 92; *Jones v. Jones*, Id. 806.

BOLMAN vs. OVERALL.

[80 Alabama, 451.]

AN INSTRUMENT IN THE FORM OF A WILL, EXECUTED FOR A VALUABLE CONSIDERATION, MAY BE ENFORCED IN EQUITY AS A COVENANT TO STAND SEIZED.

A paper in the form of a will, executed in consideration of personal services rendered or to be rendered, or other valuable consideration, and delivered to the devisee or legatee therein named, may constitute an irrevocable contract. Such testamentary paper, when founded on valuable consideration, is in the nature of a covenant to stand seized to the use of the promisee; and it will be enforced in equity under a bill in the nature of specific performance, by fastening a trust upon the property in the hands of an executor, legatees and devisees, under a subsequent inconsistent will.

APPEAL from a decree of the Chancery Court of Mobile.
The opinion states the case.

F. G. Bromberg, for the appellants.

Overall & Bestor, for the respondents.

SOMERVILLE, J. The appeal is from a decree of the chancellor sustaining a demurrer to the bill of complaint filed by the appellants for specific performance. The complainants are the legatees under the will of one Augusta Lohman, which instrument purported to be executed in consideration of valuable services rendered to her in her lifetime by the complainants, and was executed on December first, 1881, and delivered to Mrs. Louisa Bolman, who was made executrix of the will, and residuary legatee therein, and is one of the complainants. In April, 1883, the testator executed another will in which she sought to revoke the previous one, with all of the legacies made under its provisions, and leaving her entire property to other beneficiaries. This will was duly probated, the defendant Overall being the executor therein, and the other defendants legatees.

The bill, in the first place, alleges a verbal agreement made in March, 1876, between the complainant, Mrs. Bolman, and the deceased testator then living, by which it was agreed that the latter would leave to the complainants (Mrs. Bolman and her two daughters) all the property owned by her at her death, if they would come, and nurse her and take care of her, she being then sick in bed and in a helpless condition. The bill avers a faithful performance of the duties assumed by the complainants for over seven years—that from March, 1876 to February, 1883, they either went to the testator's residence, or else had her in their own, and nursed her in sickness, cooked and washed for her, and attended to all her wants, until she declined further to receive their attention, and left their home against their expressed dissent, several years before her death, which did not occur until October, 1886.

1. No doubt can be entertained as to the nature of the paper, executed by Mrs. Lohman on December first, 1881, and delivered by her to Mrs. Bolman, and purporting to be the testator's last will and testament. It is clearly a will in form, being testamentary in frame and verbiage. But it is also a contract, in essence and fact, being executed, as

stated on the face of the paper, "in consideration of past and future treatment," and, as shown by the bill, in furtherance of a previous parol agreement that it should be executed upon an admitted and specified valuable consideration. Cases are frequent in which instruments have been construed to be partly testamentary and partly contractual. And when based on a valuable consideration, a paper, in form a will, may, especially when delivered to a party interested, or to another for him, constitute legally and in fact an irrevocable contract. (*Taylor v. Kelly*, 31 Ala. 59; *Kinnebrew v. Kinnebrew*, 55 Ala. 628; Schouler on Wills, §§ 452-455.)

The purpose of the bill, as we construe it, is not to enforce the parol agreement, in which the deceased agreed to bequeath to complainants all the property she might own at the time of her death, but rather to enforce the modified agreement as evidenced by the written instrument, purporting to be a will. No question can properly arise, therefore, as to the influence of the statute of frauds, in view of the fact that real estate is involved in the transaction. There are many well considered cases, however, in which parol agreements of this character, executed on the side of the promisee, have been enforced even in relation to land. But on these we have now no occasion to comment at any length. (*Rhodes v. Rhodes*, 3 Sandf. Ch. [N. Y.] 279; *Shakespeare v. Markham*, 10 Hun [N. Y.] 311.)

2. There is nothing in this contract which is repugnant to public policy. All the authorities agree that one may, for a valuable consideration, renounce the absolute power to dispose of his estate at pleasure, and bind himself by contract to dispose of his property by will to a particular person, and that such contract may be enforced in the courts after his decease, either by an action for its breach against the personal representative, or, in a proper case, by bill in the nature of specific performance against his heirs, devisees, or personal representative. The validity of such agreements, as remarked by Mr. Freeman, in a recent note on this subject to the case of *Johnson v. Hubbell* (10 N. J.

Eq. Rep. [2 Stock.] 332 ; s. c., 66 Amer. Dec. 773, 784), "is supported by an unbroken current of authorities, both English and American." (*Wright v. Tinsley*, 30 Mo. 389 ; *Parsell v. Stryker*, 41 N. Y. 480.) This principle does not embrace cases where services are rendered, or other valuable consideration parted with, in mere expectation of a legacy, and in reliance only on the testator's generosity. But there must be a contract, express or implied, stipulating for an agreed compensation by way of legacy or devise. (*Martin v. Wright*, 15 Wend. 460.)

3. The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance. It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy, for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed so long as he lives. And after his death, he is no longer capable of doing the thing agreed by him to be done. But the theory on which the courts proceed is to construe such an agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased, or others holding under them charged with notice of the trust. It is in the nature of a covenant to stand seized to the use of the promisee, as if the promisor had agreed to retain a life estate in the property, with remainder to the promisee in the event the promisor owns it at the time of his death, but with full power on the part of the promisor to make any *bona fide* disposition of it during his life to another, otherwise than by will. The power to make such a will having been renounced, the attempt to exercise it is deemed a fraud on the rights of the promisee under the contract, thus bringing into exercise another ground of equity jurisdiction. As said by Lord Camden in *Dufour v. Perran* (quoted by Hargrave in his Judicial

Arguments, Vol. 2, p. 310), there is no difference between one's promising to make a will in such a form, and making such will with a promise not to revoke it. The courts do not set aside the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract. (*Wright v. Tinsbey*, 30 Mo. 389; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Rivers v. Rivers* [4 Desaus, 190], s. c., 4 Amer. Dec. 609; *Randall v. Willis*, 5 Ves. Jr. 262; *Johnson v. Hubbell*, 66 Amer. Dec. 773, 787; note and cases cited; 1 Story's Eq. Jur. [12th Ed.] §§ 785, 786; *Taylor v. Mitchell*, 87 Penn. St. 518; *Logan v. McGinnis*, 12 Penn. St. 27; *Waterman on Spec. Per.* § 41; *Green v. Broyles* [3 Humph. 167], s. c., 39 Amer. Dec. 156; *Schumaker v. Schmidt*, 44 Ala. 545.) Mr. Schouler in his recent Treatise on Wills, § 454, lays down the rule, as deduced from the authorities, to be, that "where one contracts upon valuable consideration, to execute a will after a certain tenor, the agreement is binding upon his death, and may be specifically enforced against his personal representatives and his estate." Mr. Parsons, after recognizing the validity and binding force of such agreements, and their incapability of literal specific performance, observes, in his work on contracts, that it has, nevertheless, "been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms." "And," he adds, "the court will not allow this *post mortem* remedy to be defeated by any devise, or conveyance in the lifetime inconsistent with the agreement." (3 Parson's Contr. [7th Ed.] §§ 406, 407.) In *Waterman on Specific Performance*, § 41, it is said generally: "A person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement by compelling the heir at law to convey the property in accordance with the terms of the contract; but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not

sustained except upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the decedent."

Under all of the best considered authorities, we are of opinion, that the contract, evidenced by the will, is one which is capable of being enforced against the executor and legatees under Mrs. Lohman's last will, they being declared to be trustees of the executor's property for complainant's benefit, unless some good reason is shown to the contrary, other than any appearing in the statements of the bill.

4. The complainants are all legatees in the will and can clearly unite in the enforcement of their rights, which do not differ in nature or kind, but only in extent or quantity.

5. The fact that the last will of Mrs. Lohman has been probated by a court having exclusive jurisdiction of the probate of wills, and that this action of such court is conclusive on the complainants, and all others, is no answer to the purpose and prayer of the bill. No effort is made to disturb or set aside such probate, but to fasten a trust on the property, in the hands of the executor and legatees, who are admitted to hold the legal title to such property by virtue of the will, and its probate by the proper court.

6. One of the objections taken by demurrer to the bill is that Mrs. Lohman was a married woman at the time she made the alleged contract, and that for this reason it was not binding on her. This depends on the character of the separate estate held by her. If this was equitable, then she could bind it as if she were a *femme sole*, so that a trust could be fastened on, and made to follow it in the hands of the defendants, who are mere volunteers, and not purchasers for value. If, however, her estate be statutory, which must be assumed unless the contrary be alleged in the bill, Mrs. Lohman, being under coverture, labored under a disability to bind it by contract, or create a trust in it, in the manner attempted. It is true, that, under our statute married women may dispose of their separate estates by last will and testament. But this power can be exercised only in the manner specified, and can not be construed to confer the

authority to make a contract fastening a trust on such estate—one which is tantamount in legal effect to a covenant to stand seized to the use of another. The incapacity of the wife to contract at common law would operate to render such a contract, which is executory in nature, void and of no effect. (*Blythe v. Dargin*, 68 Ala. 370; *Waddell v. Weaver*, 42 Ala. 293; *Jenkins v. Harrison*, 66 Ala. 345.)

The averments of the bill not being sufficiently certain to show that the estate of Mrs. Lohman was equitable, the *fifteenth* ground of demurrer to the bill was properly sustained.

7. So there was, in our judgment, no error in sustaining the *fifth* ground, which seems to have been well taken. Mrs. Bolman, one of the complainants, appears from the bill also to have been a married woman. The consideration paid by her for the legacy agreed to be left her was her personal services. Her services and earnings, presumptively, belonged to her husband. He being dead, the action would seem, therefore, to properly lie in the name of his personal representative and not in that of the wife. Upon the facts stated in the bill the executor would have no defense to another suit instituted by any creditor of the deceased husband who might hereafter obtain letters of administration to his estate. The husband, it is true, may relinquish such earnings to the wife, and such release would be valid except as to existing creditors; or, if fraudulently made, it might be subject to assailment also by his subsequent creditors. To make a good case for complainants the bill should have averred that the husband's estate had no creditors, or else that such debts were paid, and have also alleged facts showing a relinquishment by the husband, express or implied, of the wife's earnings to her. (*Pinkston v. McLemore*, 31 Ala. 398; *Roswald v. Wing*, 74 Ala. 346.)

8. It is manifest that the complainants' remedy at law was not complete and adequate. It may be that they might have maintained an action against the executor for the value of the personal services rendered, or perhaps of the property agreed to be devised, as a claim against the estate of

Mrs. Lohman, had she been *sui juris* when she made the contract. But being a married woman she could not bind herself personally, as we have before said, but could only bind her separate estate, provided it was equitable. Moreover, specific performance is peculiarly a branch of equity jurisdiction, especially in cases of this particular nature involving the matter of trust, and the prevention of fraud. "A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction." (*Parsell v. Stryker*, 41 N. Y. 48, 487; *Johnson v. Hubbell*, 10 N. J. Eq. Rep. 332 [s. c., 66 Amer. Rep. 773], *supra*.)

The decree of the chancellor sustaining the demurrer to the bill is affirmed.

The distinction between a Deed and a Will.—It is of the essence of a will that it be ambulatory and revocable at the pleasure of the testator. 1 Jarman on Wills (4th Eng. Ed.) 16; Beach on Wills, § 52. Whatever be its form, an instrument cannot continue to be a will after passing beyond the power of the maker thereof to alter or revoke it. *Ex instanti* it becomes a contract or deed. The only question, then, which can properly arise, is, whether a particular instrument is in fact a will.

The true principle of construction is that whatever be the form of the instrument, if it vest no present title and merely appoints what is to be done after the death of the maker, it is testamentary in nature and at any time revocable; but that if it confer an immediate title, postponing only the enjoyment thereof during the grantor's lifetime, it is a deed and cannot be revoked. *Kelleher v. Kerman*, 60 Md. 440, 444; *Wall v. Wall*, 30 Miss. 91, 96.

This cannot always be determined from the language of the instrument itself. In those States which do not require the publication of a will, a testator need not know the disposition of property he is making to be a testamentary act. The instrument may declare itself to be a deed or contract. *Kelleher v. Kerman*, 60 Md. 440, 445; *Walker v. Jones*, 38 Ala. 448. *Evans v. Lauderdale* 10, Lea. 78, 75; *Jaggers v. Estes*, 2 Strob. Eq. 343; *Alexander v. Burnett*, 5 Rich. Eq. 189; *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620, 621; *Hester v. Young*, 2 Ga. 46; *Turner v. Scott*, 51 Pa. St. 130; *Epperson v. Mills*, 19 Tex. 67; *Habergham v. Vincent*, 2 Ves. Jr. 230; *Kelleher v. Kerman*, 60 Md. 440; Ct. Atty. Gen. v.

Jones, 9 Price, 368; Thompson v. Brown, 3 Mylne & K. 32; Walker v. Jones, 28 Ala. 448; Wall v. Wall, 30 Miss. 91; Ct. Meck's Appeal, 97 Pa. St. 313.

In these cases, what was the intention of the maker of the instrument becomes a question of fact, which, not clear from the writing itself, must be ascertained from extrinsic evidence and the circumstances of each particular case. Ferguson v. Ferguson, 27 Tex. 344; Wellborn v. Weaver, 17 Ga. 267; 68 Am. Dec. 235, 242; Green v. Froude, 1 Mod. 117; Lyles v. Lyles, 2 Nott & McC. 581; Milledge v. Lamar, 4 Desaus. Eq. 617; Habbergham v. Vincent, 2 Ves. Jr. 204; Regden v. Vallier, 2 Ves. Sr. 255, 258.

"Of these circumstances, the one most clearly indicative of an intention to vest in the grantee a present title, is the delivery of the deed, by which formality the grantor puts it beyond his power to revoke his act. Inasmuch as delivery is the final act without which all the other formalities of a deed are ineffectual, and inasmuch as a will 'is in its own nature ambulatory and revocable,' it follows that the same act which completes the instrument and renders it operative as a deed, destroys it and renders it inoperative as a will." Beach on Wills, § 51.

As to actual and constructive delivery, see Devlin on Deeds, §§ 260, *et seq.*

IN RE TRAYLOR.

[75 California, 189.]

A BEQUEST OF ORNAMENTS INCLUDES JEWELRY.

The word "ornaments" in a will includes the jewelry used by the testatrix for her personal decoration.

APPEAL from a decree of the Superior Court of San Francisco. The facts appear in the opinion.

D. William Douthitt, for the appellant.

Olney, Chickering & Thomas, for the respondent.

Selden S. Wright, for certain legatees.

McFARLAND, J. The deceased, Mrs. Elizabeth D. T aylor, left an estate worth about one hundred and fifty-five thousand dollars. Her will contains (among other bequests) the following: "To my niece, Louise E. Matthews of this city, I give ten thousand dollars, my piano, sewing-machine, finger-rings (save the diamond ring I habitually wear), and so many of my books, pictures, and ornaments (not otherwise bequeathed specifically) as she shall choose to take." The said Louise appears to be as near a relative as any other person named in the will.

The court below entered a decree of partial distribution, in which there was distributed to said Louise E. Matthews (now Louise M. Overacker) certain personal property set forth in exhibit A, which forms part of the record. From this decree, and from an order denying a new trial, Elizabeth H. Siddall, admitted to be the heir at law, appeals upon the ground that the personal property so distributed was not intended by the testatrix to be bequeathed to said Louise. And the question to be determined is, whether or not the court below erred in holding that the things distributed were "ornaments" within the meaning of that word as used in the will.

Exhibit A contains a number of articles not classified under the head of "jewelry;" and we think that the court was right in holding them to be ornaments. About the character of a few of them, of small value, there may be some room for doubt; but we think the ruling of the court below concerning them was not erroneous.

Exhibit A, however, contains a list of articles scheduled under the head of "jewelry," and about these the main question arises. They consist of breast-pins, bracelets, ear-rings, lace-pins, sleeve-buttons, glove-buttons, brooches, lockets, chains, etc., made of various jewels and gold,—such as women usually wear for personal decoration.

We have no doubt that the word "ornaments," in its general signification, and freed from any modification that might come from association in particular instances with other language, includes "jewelry" worn by women for the

purpose of adding grace or beauty to their persons, or for the purpose of complying with the usages of society. Such is its meaning both in classic English and in common language. In Webster's dictionary an illustration is given from Sir Thomas Browne as follows: "Some think it most *ornamental* to wear their bracelets on their wrists; others, about their ankles." And the Jenkins of the present day in his descriptions of the costumes of ladies at evening parties writes, "*ornaments*, diamonds."

But it is contended that as the word "ornament," as used in the will, immediately follows the words "books," and "pictures," it must, therefore, be restricted to things resembling—that is, *ejusdem generis* with—books and pictures. There is certainly force in this suggestion; but the words "not otherwise specifically bequeathed," which immediately follow "ornaments," must also be considered. And when we look at the few things which have been otherwise specifically bequeathed, we find that nearly every one of them that could in any sense be called an ornament is an article of jewelry. The words "as she shall choose to take" also indicate that liberality of construction in favor of the legatee should be indulged in.

The discovery of the real intention of the testatrix in this case is, no doubt, a difficult matter. But as the word "ornaments," in its general and ordinary sense, includes the property in contest, and as the other language of the will, taken all together, does not clearly indicate that the word was used in a special or limited sense, we conclude that the view taken of the question by the learned judge of the court below is more satisfactory than the opposite view taken by appellant.

Judgment and order affirmed.

SHARPSTIEN, J., SEARLS, C. J., PATTERSON, J., and TEMPLE, J., concurred.

Rehearing denied.

IN RE SHILLABER.

[74 California, 144.]

REFERENCE IN AN HOLOGRAPHIC WILL TO A LETTER NOT
IN EXISTENCE.

A reference in an holographic will to a letter not in existence at the time of its execution, will not serve to constitute such letter when subsequently written a part of the will; but the will may be admitted to probate and the letter excluded.

APPEAL from a judgment of the Superior Court of San Francisco admitting a will to probate.

McAllister & Bergin, for the appellant.

Carroll Cook, Garber, Thornton & Bishop, and *William Hoff Cook*, for proponent.

M. C. Blake, for minor heirs.

Lloyd & Wood, for certain heirs.

PATERSON, J. The document which was admitted to probate in this proceeding is wholly in the handwriting of Mrs. Shillaber, deceased. The third clause of the will reads as follows: "I give and bequeath to my said executor my silverware, jewelry, paintings, organ, clothing of every description, carriage, library, bas relievos, bronzes, statuary, excepting my three large pieces, viz., 'Delilah,' 'Saul,' and 'Lost Pleiad,' and request him to dispose of the same in the manner specified in my letter to him of this date." After the execution of this will, she dictated a letter to Carroll Cook, Esq., named in her will as executor thereof. This letter is in the handwriting of Mr. Cook, but is signed by the deceased. It commenced as follows:—

"SAN FRANCISCO, CAL., September 8, 1884.

"TO CARROL COOK, Esq., San Francisco, Cal.

"*My Dear Nephew*,—In my will, which I have this day executed, I have left certain personal property to you to be

disposed of by you as I should by letter direct. I desire the following disposition made thereof, viz.," etc. (Here follow directions for disposition of the articles above-named.)

The court found—and the finding is supported by evidence—that the letter was dictated and signed after the execution of the will. Upon the objection that the letter was not in existence at the time of the execution of the will it was excluded, and the document, which is wholly in the handwriting of Mrs. Shillaber, was admitted to probate. It is claimed by appellant that the two documents were designed to constitute one instrument; that they are such in law, and as they are not wholly in the handwriting of the deceased, they do not constitute a valid olographic will.

All the authorities to which our attention has been called agree that any paper may be referred to, and may be a part of the will, if such paper be in existence at the time of the execution thereof. If the will be duly executed and attested, the paper referred to, whether attested or not, will become a part of the will, if it be already in existence, and is clearly described and identified. The identification must be by a description given of the paper in the will. In the case at bar, the letter referred to was not in existence at the time of the execution of the will. It has been held that "a reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular; but the authorities seem clearly to establish that, where there is a reference to any written document, described as *then existing* in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it, and the only question then is whether the evidence is sufficient for the purpose." (*Allen v. Maddox*, 11 Moore P. C. 454.) We think that, under the evidence and the language of the will, the letter was properly excluded.

It is claimed that without the letter the will is incomplete, for only through the letter can the beneficiaries

therein named make title to the bequests provided for them. We think, however, that the will, being effective in other parts, was properly admitted to probate, although the bequests named in the third article above quoted be void for uncertainty. (*George v. George*, 47 N. H. 45; *Brown v. Bendell*, L. R. 21 Ch. Div. 667.) The property named in the third article is evidently but a small part of the estate. It is all personal property, and intestacy as to any portion of the estate should be avoided if possible. Our code provides that "of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy." It is not clear that the will without the letter is incomplete. It has been held that as to personal property, a document like this letter, although not entitled to probate as a part of the will, is sufficient to enable the beneficiaries named in it to proceed in a court of equity after the property is distributed to the executor under a clause of the will similar to that quoted above, to compel the executor to execute the trust in accordance with the directions contained in the letter. (*In re Fleetwood*, L. R. 15 Ch. Div. 594.)

Judgment and order affirmed.

TEMPLE, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

See, also, *Newton v. Seaman's Friend Society*, 2 Am. Prob. Rep. 18, and the note; *Fosselman v. Elder*, Id. 541.

LEATHERS vs. GRAY.

[101 North Carolina, 162.]

THE RULE IN SHELLEY'S CASE.

A devise to one "during her natural life, and after her death to the begotten heirs or heiresses of her body," vests in the devisee an absolute estate in fee simple, under the rule in Shelley's Case.

APPLICATION for a rehearing of this case as reported in 96 N. C. 548. The facts appear in the opinions.

John W. Graham, J. B. Batchelor, and John Devereux, for the petitioner.

John Manning and A. W. Graham, contra.

MERRIMON, J. This is an application to rehear the case of *Leathers v. Gray*, reported in the 96th N. C. 548. The will of Joseph Armstrong, deceased, a clause of which was interpreted in that case, was executed on the 23d day of May, 1839, and the testator having died in the meantime, it was proven in 1840.

The following is a copy of the clause in question of this will: "I also give and bequeath to my son, James W. Armstrong, the following property, to be received as soon as convenient, after the death or marriage of his mother, Peggy Armstrong, viz.: One-half of three tracts of land, all lying on the waters of Flat River. The first is the tract my father lived and died on, containing 220 acres; the second is the tract that I bought from Henry Berry, containing 17 acres, and the third is a tract that I bought from my brother, William Armstrong, containing 216 acres," and also "*I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body forever, one-half of the three tracts of land, all lying on the waters of Flat River,*" these tracts being the same above designated. This Court in interpreting the last recited clause decided that Parthenia Leathers took but a life estate in the lands devised to her, and that her children took and were entitled to the remainder in fee therein.

The petitioner in this application, who is the defendant in the action, assigns error and contends that the words of the clause, "*and after her death to the begotten heirs or heiresses of her body forever,*" are words of limitation, and not words of purchase, and therefore Parthenia Leathers took the ab-

solute fee simple estate in one-half of the lands so devised, and the same passed by her deed to the petitioner.

It is conceded that at the time the will before us became operative it was a settled rule of law, prevailing in this State that, whenever the ancestor of any gift or conveyance took an estate of freehold—an estate for life—and in the same gift or conveyance an estate is limited either mediately or immediately to “his heirs,” or to the “heirs of his body,” as a class, to take in succession as heirs to him, such words are words of limitation of the estate, and convey the inheritance—the whole property—to the ancestor, and they are not words of purchase. That is, in such case, the heir would take by descent and not by purchase, the ancestor would take the absolute property—the whole estate—with the right and power to dispose of it in any lawful way. (*Shelley's Case*, 1 Coke Report, 104; 2 Bl. Com. 243; 2 Min. Inst. 241, 242; 2 Wash. R. P. 553; *Davidson v. Davidson*, 1 Hawks, 163; *Sanders v. Hyatt*, Id. 247; *Ham v. Ham*, 1 D. & B. Eq. 598; *Allen v. Pass*, 4 D. & B. 77; *Floyd v. Thompson*, Id. 479; *Hollowell v. Kornegay*, 7 Ired. 261; *Weatherly v. Armfield*, 8 Ired. 25; *Folk v. Whitley*, Id. 133; *King v. Utley*, 85 N. C. 59; *Mills v. Thorne*, 95 N. C. 362.)

But it is seriously contended that this rule, commonly called “*The rule in Shelley's Case*,” has no proper application to the clause of the will under consideration, because it sufficiently appears that the words thereof, “begotten heirs or heiresses of her body,” were not used in a strict technical sense, but to imply simply the children, male or female, or both, of Parthenia Leathers, in which case her children would take as purchasers. We accepted this view as the correct one, giving effect to the intention of the testator, and made the decision, the correctness of which is now called in question. But after hearing the case reargued, and having given the question raised much further consideration, we are of opinion that, although the intention of the testator may have been—no doubt was—such as we declared it to be, he failed to express his purpose con-

sistently with a settled rule of law, which it is our duty to uphold and enforce.

When a testator employs words and phrases to express his intention in the disposition of his property, by will, that have a well known legal or technical meaning, he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall, in some appropriate way, to some extent, to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of such words bring his intention so expressed, within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator.

Otherwise technical words would have no certain meaning or effect, and the rule of law would be subverted in order to effectuate the real intention of the testator, unexpressed or imperfectly expressed. It is said, however, that the real intention of the testator must have effect, and so it must, but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it.

Moreover, a testator cannot ignore, displace and set at naught a rule of law applicable to and affecting the disposition of his property by his will, in whole or in part—the rule of law must prevail—he must make his disposition of his property as allowed by and consistently with it; it determines the meaning and effect of his will, and its several parts, by the language employed in it, and not by what is intended, but not expressed, or not sufficiently expressed. He must express his intention in words appropriate and sufficient to express his real meaning, and if he employs technical legal words the technical meaning must prevail, unless the same shall be qualified or modified by super-added words in the will.

The material part of the clause in question of the will before us is, "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death

to the begotten heirs or heiresses of her body forever, one-half of the three tracts of land," &c. Omitting, for the present, from this clause the word "heiresses," the words thereof, "heirs . . . of her body," have a technical legal meaning, and it is clear—nothing else appearing—created an estate tail in the devisee named, which was converted by the statute (Acts 1784, Ch. 204, § 5; The Code, § 1325) into an estate in fee simple. That statute provides that "every person seized of an estate tail shall be deemed to be seized of the same in fee simple," &c., and applies to the will under consideration. (*Hollowell v. Kornegay, supra; Weatherly v. Armfield, supra; Folk v. Whitley, supra.*)

If there were words in the context clearly showing that the testator did not use the words "heirs . . . of her body" in their technical sense, but to imply children of the devisee, then in that case these words would be treated as words of purchase, and the devisee would have taken but a life estate, and her children would have taken the remainder. But, upon further reflection and scrutiny, we think there are no words of the context that can fairly, in view of numerous decisions of this and other Courts, be construed as having such qualifying effect. Superadded words to have such effect must have appropriate pertinency in meaning and bearing; the purpose to qualify and change the technical meaning of language used must appear with reasonable certainty. It seems to us that the words "or heiresses" used in the clause referred to, cannot have such, or any qualifying effect. In their direct connection the next preceding word, "heirs," imply and embrace "heiresses," and all they mean or can mean, in their connection—they are mere expletives and serve no useful purpose. The phrase, "her heirs or heiresses," means no more than that the testator devised the land to his daughter and the heirs of her body, male and female, and the course of descent is not changed in any degree from what it would be if the word "heiresses" did not appear, nor does that word suggest or imply children of the testator any more than the word "heirs." (*Donnell v. Mateer, 5 Ired. Eq. 7; Coon v.*

Rice, 7 Ired. 217; *Folk v. Whitney*, *supra*; *Worrell v. Vinson*, 5 Jones, 91; *Gillis v. Harris*, 6 Jones' Eq. 267; 2 Minor's Inst. 351; Wash. Real Prop. 274; note to *Shelley's Case*, 1 Coke R. 262.)

In our efforts heretofore to effectuate what seemed to us to be the real intention of the testators, we followed, to some extent, the case of *Jarvis v. Wyatt* (4 Hawks, 227). In our further researches we find that case to be questionable authority. Indeed, it has in effect—not in terms—been overruled by numerous decisions. In *Chambers v. Payne* (6 Jones' Eq. 276), this Court commenting on it, say: "Of that case it is only necessary for us to remark that the point decided may be supported by the peculiar language of the will, or if it cannot be supported on that ground it must be considered as having been overruled by numerous cases since adjudicated upon the point, to several of which we have already referred."

It follows that under the devise in question Parthenia Leathers took the fee simple estate in the land described in the pleadings, and that the plaintiff in the action was not entitled to recover.

The prayer of the petitioner must, therefore, be granted. The case must be reheard, and the judgment of this Court entered therein at the February Term of 1887 must be set aside, and judgment must be entered affirming the judgment of the Superior Court.

Prayer of the petitioner granted.

DAVIS, J., dissenting. By the use of the words "I give and bequeath to my daughter, Parthenia Leathers, during her natural life, and after her death to the begotten heirs or heiresses of her body, one-half of three tracts of land," &c., I think it manifest that it was not only the paramount intent, but the only intent of the testator to give the land to his daughter for life, with remainder to her children, sons and daughters, but under the rule in *Shelley's case*, that would not in the least alter the construction to be placed upon his will, if he used the words "the begotten

heirs or heiresses of her body," as meaning simply *heirs* in the technical sense of that word, for I believe it will be conceded that the rule often, and in cases of wills written by unprofessional persons, oftener than otherwise, defeats the intent, and the *single and only* intent of the testator, yet, whatever may have been his intent, if he used the word *heirs* simply, without superadded words to limit or explain its meaning, the technical meaning would follow. From the whole clause of the testator's will it seems to me quite clear that he used the word not in any technical sense (for the language shows that with him there could have been none), but as *descriptio personarum*, and his one *intent*, and *only* intent was to give the land to his daughter for life, remainder to her children. The rule in Shelley's case is based upon the idea that there is in the mind of the maker of the instrument, that comes under its operation two intents, one a *paramount* or *general*, or *legal* intent as it is called, and the other a *particular* or *prescribed* intent, and if both intents cannot have effect, the latter must yield to the former. See the question discussed by PEARSON, J., in *Ward v. Jones*, (5 Ired. Eq. 400.) See the authorities cited in the case in 96 N. C. 548.

It is a rule of construction, that when technical words or phrases are used, nothing else appearing, they must be taken in their technical sense, and when the word "heirs," or "heirs of the body" are used alone, without anything to show that they were not so intended, the technical meaning must prevail, because, standing alone, there can be no other certain meaning given to them, but it has been held and is settled in this State that superadded words, "equally to be divided," and like qualifying words which show that they were not used in a technical sense, will prevent the operation of the rule in Shelley's case. (*Mills v. Thorne*, 95 N. C. 362, and authorities there cited; *Chambers v. Payne*, 6 Jones' Eq. 276.) Such words are not treated as surplusage, but as aids to show the true meaning of the testator. Suppose the testator in the case before us had added, by way of explanation, by "heirs and heiresses," "I mean sons

and daughters," it would clearly have shown that he did not use them in any technical sense, and I apprehend that in that case the rule in Shelley's case would not be insisted on, and yet, it seems to me that is clearly what he meant, and I cannot conceive of their use by him in a technical sense, unless you treat the word "heiresses" as surplusage, and if that word, in connection with other parts of his will, tend to show his meaning, I do not see why we should reject it.

I think we have no right to reject, as surplusage, any word or words used by the testator that may tend to show or aid in showing what he meant. It is his will that must prevail, and if it is apparent that he uses a technical word not in a technical sense, the meaning attached to it by him should govern in the construction of his will.

If it be said that by "*heirs* or *heiresses*" is meant nothing more than *heirs*, I think the answer is that it shows none the less conclusively that the words were not used by the testator in the technical sense, importing the class of persons who take indefinitely as *heirs*.

Whatever in the past may have been the value of the rule in Shelley's case, I think it should be strictly construed when otherwise it would defeat the manifest intention of the testator. I think the tendency of modern decisions in America is to limit its operation to cases that come strictly and technically within the rule, and in many of the States it has been abolished by statute. It is a rule by which the meaning of the testator is construed, and when this meaning is clear I do not see why it should be defeated by a too liberal *construction* of a rule of construction.

As much as the memory of Coke is to be venerated for his great legal learning, I think, with all his faults, if not crimes, while Attorney-General, his services in behalf of popular rights and civil liberty in resisting the encroachments and tyranny of the house of Stuart, entitle him to far more lasting fame than did his services in the legal war carried on by the bench and the bar between the "Shelleyites" and the "anti-Shelleyites."

The record shows that the merits are with the defendant, who purchased for value, and I regret the more for that reason that I cannot concur in the opinion of my brethren in reversing the former decision, and am glad that in this case, at least, a strict adherence to the rule is in the interest of justice.

See, also, *Stilwell v. Knapper*, 1 Am. Prob. Rep. 211; *Shimer v. Mann*, 4 Id. 310; *Henderson v. Henderson*, 5 Id. 19; *Allen v. Craft*, Id. 365; *Millett v. Ford*, Id. 384.

WILL OF EHLE.

[73 Wisconsin, 445.]

CONSTRUCTION OF A WILL.—SURVIVORSHIP.

A testator devised all his real estate to his son for life, with remainder to the three infant children of his son, in fee. The testator, his son, and the wife and three children of his son having perished in the same catastrophe, it was *held*, that the evidence warranted the finding that the testator died before his son, and the son before either his wife or the three children, that the estate vested, under the will, in the three children, and that its descent must be traced from them.

APPEALS from the Circuit Court for Sheboygan County. August 31, 1881, Abram Ehle made his last will and testament, the essential portions of which to be here considered are as follows :—

“I give and devise to my wife, Susan Ehle, all of my real estate for the term of her natural life, with reversion at her death to my son James for the term of his natural life, and at his death said real estate shall revert to and become the property of his three children, namely Abram T.,

Flora, and Mary, absolutely. The land so devised consists of 160 acres, all in Greenbush, county of Sheboygan, and at the decease of my son James shall be divided into three (3) portions, by lines running from north to south, each embracing fifty-three and one-third acres, or thereabouts; but the western third, of fifty-three and one-third acres, embracing the residence and farm buildings, shall become the property of my grandson aforesaid, Abram T., the other two-thirds, respectively, becoming the property of my two grandchildren, Flora and Mary, respectively; it being understood, and my will, that Flora, aforesaid, shall possess the east third, and Mary, her sister, the middle third; . . . provided, also, that in case of the death of either of the three (3) grandchildren, reversioners above specified, who shall die before arriving at his or her legal majority, then the reversion to that individual minor shall be divided and become the property of the other two beneficiaries in equal proportion, and in case of the death of a second reversioner the survivor shall take the whole. Also I will and direct that my gold-headed cane shall be the property of my son James for the term of his natural life, with reversion at his decease to my grandson, Abram T., aforesaid. Then I give and bequeath to my son, James Ehle, all the goods and chattels in my possession, absolutely."

April 20, 1885, Susan Ehle, mentioned in the will, died. The said Abram Ehle, and the said James A. Ehle, mentioned in said will, and his three infant children, to wit, Abram T., Flora, and Mary, mentioned in said will, and their mother, Helen Ehle, the wife of the said James, were each and all burned to death on the morning of February 16, 1886, at the house of said Abram Ehle, in which they all resided, in the town of Greenbush, Sheboygan County. Thereupon said will was admitted to probate in the county court of that county.

From the judgment and assignment of said estates, entered in said matters respectively in said county court, the blood relatives and heirs at law of said Abram and James appealed to the circuit court; and thereupon the jury was

waived therein, and the cause was tried by said circuit court; and, upon the trial thereof therein, the court found, in relation to the estate of said Abram, in addition to the facts stated, in effect, that said Abram survived his wife, Susan, mentioned in the will; that said James was the only child of said Abram; that said infants, Flora, Abram T., and Mary, were the only children of said James and grandchildren of said Abram; that said Helen was the mother of said infant children, and the wife of said James; that, of the persons above named at said burning, the said Abram died first in order of time, and the said James next, and the said infant children, with their said mother, died last; that John W. and Caroline Taylor are the maternal grandparents and only heirs at law surviving said three infant children; that said John W. Taylor is the only duly qualified administrator of the estates of said three infant children; that by said will the said Abram bequeathed and devised all of his estate to said three infant children, subject to the life interest therein in favor of their said father, the said James.

As conclusions of law therefrom, the court found, in relation to said Abram's estate, in effect, that under said will all of the estate of said Abram vested in said three infant children, in their life-time, as devisees and legatees; that, by the death of all of said infant children all of such estate vested in said John W. and Caroline Taylor as heirs at law of said infant children, and in said John W. Taylor as administrator of the estates of said grandchildren; that the judgment and order of the county court therein, assigning all of the real estate left by said Abram to the said John W. and Caroline Taylor as heirs at law of said infant children, and all of the residue of the personal property left by said Abram to the said John W. Taylor as administrator of the estates of said infant children, be, and the same was thereby, affirmed; that the costs of the respective parties be taxed therein, and constitute a charge upon said estate, and be paid out of the same; and ordered judgment accordingly. From the judgment entered thereon accordingly the blood

heirs of said Abram and the said James, respectively, have appealed.

In addition to the facts stated, the court, in relation to the estate of said James, found, in effect, that said infant children and their mother all survived the said James; that all of the estate left by said James upon his death vested in said infant children, in their life-time, as his heirs at law; that by the death of said infant children, and by the appointment of said John W. Taylor as administrator of their estates, all of the residue of said estate of said James A. vested in said John W. Taylor as such administrator; that the judgment and order of the county court entered therein, assigning all of such residue, after paying all expenses of administration, to said John W. Taylor as administrator, be, and the same was thereby, affirmed; that the costs of the respective parties therein be taxed therein, and be and constitute a charge upon said estate, and be paid therefrom; and ordered judgment accordingly. From the judgment entered thereon accordingly the blood heirs of said James have appealed.

George P. Knowles, for the appellants.

Seaman & Williams, for the respondents.

CASSODAY, J. The testator, Abram Ehle, died seized of 260 acres of land, consisting of six forties, and a narrow strip of twenty acres on the west side thereof, all in compact form, and being 240 rods in length, north and south, and 173½ rods in width, east and west.

1. It is claimed that the will only covers 160 acres of such lands; and that as to the other 100 acres the testator died intestate; and hence that the same, upon the death of Abram, descended to James; and then, upon his survival of his wife and children, and his death, descended to his heirs at law, who in that event would have been the same as the heirs at law of Abram. The determination of the question may have some bearing upon the burden of proof

in connection with the more important question of survivorship which will be considered hereafter. Undoubtedly the learned counsel for the appellants is correct in claiming "that the plain intent of the testator, as evinced by the language of his will, must prevail." It is moreover true that such intention must be collected from the whole will; that in construing it the different parts are to be examined and compared, with the view of ascertaining such intention as evinced by the whole will and not as may appear from some particular part when taken alone. (*Baddeley v. Leppingwell*, 3 Burrows, 1542; *Will of Rowse*, Lofft, 99; *Lane v. Vick*, 3 How. 472; *Hopkins v. Glunt*, 111 Pa. St. 290.) By the first clause of the will the testator disposed of "all" of his real estate to his three grandchildren "absolutely," subject, however, to the two intervening life estates,—one of which had been extinguished by the death of Susan Ehle prior to the death of the testator. Standing alone, the language of that clause of the will would be too plain for construction. But it is claimed that such clause is immediately followed by another, which is either repugnant to the first, or necessarily restricts its meaning to a particular 160 acres. If such is the plain meaning of that clause, then it must prevail over the first clause, in accordance with a rule well understood and supported by authorities cited by counsel. The clause referred to is to the effect that "the land so devised consists of 160 acres," to "be divided into three portions, by lines running from north to south, each embracing fifty-three and one-third acres or thereabouts," with "the residence and buildings" on the western third. Assuming, for the present, that the description of such 160 acres is sufficiently definite and certain to be located, still we would not be justified in holding that the second clause is repugnant to the first. On the contrary, the second clause, upon such assumption, merely devised such 160 acres in three equal specific parts to the respective grandchildren, leaving the other 100 acres to go to them as tenants in common. This is in harmony with the rule that where the whole will indicates nothing to the contrary a

devise by words of general description is not to be cut down or limited by a subsequent attempt at a particular description. (*Freeman v. Coit*, 96 N. Y. 68; Schouler on Wills, § 475.) So it is in harmony with the rule that no presumption of an intent to die intestate as to any part of the estate is to be indulged, when the words of the will, fairly construed, are such as to carry the whole. (*Raudenbach's Appeal*, 87 Pa. St. 51; *Ferry's Appeal*, 102 Pa. St. 207; *Given v. Hilton*, 95 U. S. 591; Schouler on Wills, § 490.)

2. But we are not prepared to hold that the description of the 160 acres, attempted in the second clause of the will, is sufficiently definite and certain to be supported. True, it is to be divided by north and south lines into three equal parts, and the western third is to embrace the residence and farm buildings. Neither the length nor the breadth of such parts, however, are given. They may be the whole length of the farm—240 rods—or less than 148 rods, or at any point between those distances. Of course, the width would increase as the length diminished. If we understood counsel correctly as to the location of the buildings, and we assume that the lengths of such strips were calculated to extend the whole length of the farm, then it is very plain that the west line of such 160 acres might be the west line of the whole farm, or the 160 acres might be moved gradually eastward, until such west line struck such residence or farm buildings; and yet the western third would all the time answer the calls of such description. The same would be true, in a more limited sense, in case such strips only extended to the quarter line, or any point between that line and the south line of the farm. Thus it appears that the farm embraced an infinite number of 160-acre tracts, each of which would answer all the calls of the description given. We must hold that such attempted description of 160 acres is void for uncertainty.

3. This brings us to the important question of fact, whether the testator, Abram Ehle, and his son James A. Ehle, or either of them, survived all three of the infant children. The determination of the question depends upon

inferences and conclusions to be drawn from facts and circumstances in evidence and which are substantially undisputed, and the rules of law applicable as to the burden of proof. To enable us the better to educe such inferences and conclusions in the light of the legal principles applicable, it seems to be necessary to briefly state the situation on the night of this horrible disaster.

The house consumed was a wooden structure, and had been built about thirty-three years. The main part was two stories high, thirty-four feet long and twenty-four feet wide, with a cellar under the whole, and the front end facing the north. In the west third of this main part there was a front and back hall leading from the front door south to the kitchen in an addition or extension. Near the front door, and opposite the foot of the stairway leading above, was a door leading eastward into the front room, which was about eighteen feet long and sixteen feet wide. Immediately south of this front room was the family room, of about sixteen feet square, with two beds in it, in which James and his wife and three children slept. One of the beds in that room stood in the southwest corner, and was usually occupied by Helen and her two little girls. The other bed stood near it, and was usually occupied by James and his little boy. The heads of both beds were against the south wall of that room. On the north side of that room, and near the middle, was a chimney, running from the bottom of the cellar through the top of the roof. On the east side of this chimney was a door between this room and the front room. Near the chimney was a stove, with a zinc or iron sheet under it, and the pipe going into the east side of the chimney, in which fire was kept when the weather was very cold. There was also a stove in the cellar, with a pipe running into the chimney below, in which fire was sometimes kept in very cold weather. In the hall, and on the projected line of the partition between the front room and the family room, was a door between the front and back halls above mentioned. On the east side of the south end of this back hall was a door leading

south into the kitchen. This kitchen comprised the north two-thirds of a one-story addition to, or extension of, the main building; being thirty feet long north and south, and twenty feet wide east and west, and the west line of which was on the west line of the main building projected south. In the south third of this extension there were two bedrooms,—the one on the east being occupied by a Mrs. Kinney, with a door from it opening into the kitchen, and the one on the west by the young man mentioned below, with a door from it opening into the kitchen, and a window on the west side of it looking into the wood-shed. This wood-shed extended along the whole west side of the extension mentioned, and about five or six feet further north along the west side of the main building. At the southwest corner of this back hall there was a window looking into this wood-shed.

On either side of the main building there was a wing extending north to within two or three feet of the front of the main building. The west of these wings was eighteen feet wide east and west, and twenty-six feet long north and south, occupied by Abram, who was at the time nearly eighty-two years of age. On the north end of that room there were two windows and a door, and one window on the west side. In the northwest corner of this room was a bureau upon which a kerosene lamp was kept burning all night. On the east side of the room, and a foot or two south of the partition line between the front and family rooms and the front and back halls projected, there was a stove in which wood fires were kept all night. The pipe from this stove passed up and through the partition into the back hall, and from thence through the partition into the family room, and from thence into the chimney described. This stove seems to have been an old one, and occasionally when the fire would fall down the door would fly open and coals come out upon the floor. A little south of the stove there was a door leading from this room occupied by Abram into the back hall, and across that hall in a southeasterly direction was a door leading into the room at

the foot of the bed usually occupied by Helen and her two little girls. These doors were frequently left open, so that James and his wife might answer the calls of Abram, who was in poor health, and quite feeble, and required considerable attention. Helen was quite active and nervous, and easily awakened. James had a phlegmatic temperament, and it was at times difficult to wake him up. In very cold weather it was difficult to keep Abram warm, and consequently at such times his fire required much attention, and the door between his room and the back hall was usually kept shut. This was done by James or Helen, but the more frequently by Helen, as she was awakened more easily.

The old gentleman slept in a bed in the southwest corner of his room, with the head to the west. On the back or south side of his bed was a window looking out into the wood-shed. At the foot of his bed was a door leading from his room into the wood-shed, but which was kept closed in cold weather. In the southeast corner of his room, and next to the back hall, and just by the side of the window from the back hall into the wood-shed, there was a closet in which the old gentleman kept some of his clothing, medicine, pain-killer, liquors, and other things. There was no door to this closet, but calico curtains were hung up in front of it. He kept a candle therein, with snuffers, and matches to light it. The old gentleman was in the habit of going to this closet, and lighting the candle, and getting medicines or liquors in the night. After the fire his body was found in the ruins beneath where this closet was, with a candlestick and snuffers near.

No one escaped from the burning house except the young man. He had been to a neighbor's the evening before, and returned about half past ten. There was at that time a light in the old gentleman's room, but none in the kitchen. All had apparently gone to bed. He came through the wood-shed into the kitchen, and locked the kitchen door. Without striking any light, he passed from the kitchen into his bedroom at the southwest corner of the kitchen, and shut the door, and went to bed with his shirt, drawers, and

stockings on. After sleeping for some hours, he was awakened by the barking of the dog in the wood-shed. He first noticed smoke in the room. He jumped up, opened the door into the kitchen, and saw red light and flames therein. The flames from the kitchen struck him in the face, and burned his hair. At the same time he heard the cry of James from the more remote portion of the kitchen directly in front of him, but did not see him, and neither saw nor heard any one else. He jumped back, and then through the window, without lifting it, into the wood-shed. He reached back through the window for his trunk, just beneath, but the fire was so intense as to compel him to desist. It was very cold—ten or twelve degrees below zero. He had nothing on but the night-clothes mentioned. He could see through the window back of the old gentleman's bed that his room was all on fire. The west side of the kitchen and on the south side of the old gentleman's room was on fire. The fire was then, as it appeared to him, strongest in the window opening into the wood-shed from the back hall, and in that corner between the old gentleman's room and the kitchen. As he went from the wood-shed around the west side of the house to the front, he saw that fire had broken through and was coming out of the west window of the old gentleman's room and then going up toward the top of the house. The front part of the main building was all on fire, and the main part was burning stronger than the west wing. The wind was blowing hard from the northwest—a little more from the west than the north. He then went to the barn, and saw that the roof of the main part south of the chimney was all on fire and cracking. He then went to Rosenthal's, about eighty rods distant. He got there about 4 o'clock in the morning. After the fire the bodies of Helen and her three little children were found together in the ruins near the window, beneath the southeast corner of their family sleeping room. The body of Mrs. Kinney was in the ruins near the window, beneath the northeast corner of the kitchen. The body of James was found in the ruins beneath a point about six

feet south of the door leading from the back hall into the kitchen, and near the east wall of the stairway leading from the kitchen to the cellar under the main building; and at or near such body were found the remains of his watch that he was in the habit of carrying in his vest-pocket, marking time at about 20 minutes of 3, his knife that he was in the habit of carrying in his pants pocket, and the buckles from his suspenders and overshoes. Perhaps the buckles from the overshoes might be otherwise accounted for, but the other things pretty clearly indicate that James was dressed at the time of his death. It is stipulated as a fact in that case, in effect, that death would result quicker from excessive heat than from smoke.

The facts and circumstances thus summarily given induce the conviction that the fire originated in the room occupied by the old gentleman, either by the falling of coals from his stove, or more probably by the curtains taking fire from the lighted candle in his hand, while helping himself to medicine or liquor in the closet. The fact that his body was found in the ruins beneath this closet is a very strong circumstance in favor of this latter supposition. Besides, the young man asserts, in effect, that the fire in that corner—in the back hall, between that closet and the kitchen—seemed to be the strongest when he first went out into the wood-shed; that the old gentleman's room was full of fire and that the windows had broken through, and that the wind was blowing very strong from the northwest. Assuming that the fire thus originated in the old gentleman's room, such a wind would naturally blow it through his door, into the back hall, and from thence through the door into the kitchen, which was substantially the condition of things disclosed by the evidence upon such first discovery. So it would naturally blow from the back hall through the door into the family sleeping room. But had the fire originated in the family room, with the wind blowing hard from the northwest, as it did, the fire would naturally have been more advanced and intense in that part of the house, and less advanced and intense in the vicinity

of the old gentleman's room and closet, the back hall, and the part of the kitchen adjoining, than appeared upon such first discovery. The inevitable conclusion from all the evidence is that the fire originated in the old gentleman's room, and that he expired before any other person in the house. Such was, in effect, the finding of the trial court.

4. This being so, it necessarily follows, as already indicated, that immediately upon his death the title to the real estate, under the will, became vested in the three infant children absolutely, subject only to the life estate of their father, James. And it follows, as a necessary corollary to this proposition, that those who claim any part of such real estate by descent from such children (subd. 2, sec. 2270, R. S.) under James, have the burden of proving that he survived the death of each and all of those children. (*Newell v. Nichols*, 75 N. Y. 78; *Fuller v. Linzee*, 135 Mass. 468.) The case certainly presents no preponderance of evidence in favor of such survivorship of James. In the absence of such preponderance of evidence, we are compelled to hold that such life estate of James became extinguished by his death prior to the death of all of the three children, and that upon the death of all three of them the lands descended to their mother, if living; and then, in that case, upon her death, which must have immediately followed, to her parents, John W. and Caroline Taylor, under subd. 2, sec. 2270, R. S.; but in case such children or any of them survived their mother, then said lands descended to their "next of kin, in equal degree," under subd. 4 of the same section. (*Estate of Kirkendall*, 43 Wis. 167; *Ryan v. Andrews*, 21 Mich. 229.) As both paternal grandparents had previously died, it is obvious that such "next of kin" were their maternal grandparents, to wit, the said John W. and Caroline Taylor. (*Ibid.*) Such maternal grandparents were next of kin to said infant children in the second degree, whereas their next of kin on their father's side were in a much more remote degree. (2 Bl. Comm. 203.) Such were, in effect, the conclusions of the trial court.

5. The succession to the personal estate of which Abram

Ehle died seized is a more difficult and delicate question. By the will he bequeathed such personal estate to his son James absolutely. James, therefore, died seized of such personal estate, as well as any property owned by him in his own right. Under the statutes, all of the property of which he so died seized, on his death descended to such of his children and widow as might be living at the time of his death. (Secs. 2270, 3935, R. S.) If none of them survived him, however, then the same descended "to his next of kin in equal degree," as prescribed in those sections; for in that event he would "have no lawful issue, widow, father, mother, brother, nor sister." (Subd. 4, sec. 2270, R. S.) The burden, therefore, of proving that the widow and children, or some of them, survived James, rested upon those claiming under and through such widow and children. (*Newell v. Nichols*, 75 N. Y. 78; *Fuller v. Linzee*, 135 Mass. 468.) The learned counsel for the appellants strenuously insists, not only that there is no preponderance of evidence in favor of such survivorship, but that such preponderance is really the other way. The evidence most relied upon in support of this contention is the fact that at the time the young man opened his door into the kitchen, and the flames struck him in the face, he heard the cry of James in the flames some ten or twelve feet in front of him; but he did not see him, and heard no other person then, nor at all. Had James at the time been in the family room with his wife and children, and perished there with them, and his voice had been recognized as emanating from that room, without hearing any other utterance, then there would have been much force in the argument. The case most relied upon in support of such contention was, in principle, similar to the case just supposed. (*Pell v. Ball*, 1 Cheves Eq. 99.) But that adjudication, as well as the weight of the authorities and reason, is to the effect that where the death of two or more persons results from a common disaster *the case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding of such survivorship*; but in the absence of any such

evidence the question of such survivorship must necessarily be regarded as unascertainable, and hence, in such case, the rights of property must be determined as if death occurred to all at the same moment of time. (*Newell v. Nichols*, 75 N. Y. 78; *Wing v. Angrave*, 8 H. L. Cas. 183; *Russell v. Hallett*, 23 Kan. 276; 3 Whart. & S. Med. Jur. § 734; *Coye v. Leach*, 41 Am. Dec. 523-525, notes; *Rhodes v. Rhodes*, L. R. 36 Ch. Div. 586, cited in *Whiteley v. Equitable L. A. Society*, 72 Wis. 176.)

We are therefore called upon to inquire whether there is any evidence to support the finding that the children and their mother survived the death of James. If the cry of James was evidence that he survived any one, aside from his father, there would be more plausibility in saying it was Mrs. Kinney, as both of their bodies were found beneath the ruins of the same room. Her bedroom was more remote from the place of the origin of the fire than any one in the house. The young man was manifestly in no more danger in his room than she was in hers, if as much. But he heard no cry from her, notwithstanding the door of her room was but a few feet from his. At the time he looked into the kitchen the fire in the northwest corner of that room, where the body of James was found, must have been much more intense than near her bedroom, or in the northeast corner of the kitchen, where her body was found. This being so, we would naturally suppose that she would have made some outcry at the time the young man looked into the kitchen, if she was then in that room. From her situation, and all the circumstances, it may fairly be inferred that she became suffocated without much exclamation, or else that she did not leave her room until after the young man had escaped into the wood-shed, and when the circumstances were more unfavorable to his hearing such cry from her or any of the remaining victims.

But there are other circumstances strongly against the contention of the appellants. It is established by uncontradicted evidence that James was enveloped by intense flames at the time of the utterance of the cry, and hence he

must have expired within a few seconds thereafter. There is no evidence as to whether the door leading from the back hall into the room occupied by the children and their mother was open so as to admit the fire prior to such cry, unless it be inferred from the fact that James is supposed to have slept in his bed that night as usual, and must have passed out into the back hall before being enveloped in flames. He manifestly had his pants and vest on when he expired. Whether he put them on just before leaving his sleeping-room, or had worn them all night in consequence of the severity of the cold, which necessitated more frequent attention to his father's fires, is a mere matter of conjecture. So, whether he shut the door when he passed out of his sleeping-room, or left it open, or whether the fire had got into that back hall before he passed into it, or whether the door between his father's room and that back hall was open or shut when he passed from his sleeping-room into that hall, are mere matters of conjecture. It may be fairly inferred that at the time he left his sleeping-room there was no fire in it or visible from it; otherwise he would have attempted to rescue his wife and children. So it may be fairly inferred that he left that room either in answer to a recognized cry or to supply a supposed want of his father, and that the fire entered the back hall after he got into it, either by his opening the door into his father's room or in some other way. The only other hypothesis is that he had been absent from his sleeping-room for some little time before the fire.

Another circumstance tends to prove that the fire did not penetrate the family sleeping-room until some time after James had left it, and that is the fact that his wife succeeded in taking the three children from their beds to a point near their east window, where they were manifestly overtaken by the flames, or suffocated by the smoke, and expired together. The direct evidence, therefore, establishes the fact that James uttered the cry under circumstances which made death certain to him within a few seconds; whereas, there is no evidence that at that same moment of

time the flames had penetrated the family sleeping-room,—much less that at that same moment death was equally imminent to the children and their mother. It is not the case of death to several from the same direct operating cause, as an explosion; nor yet the case of several burning to death in the same room, or in the same building, in the absence of all evidence tending to show the situation of the victims and the place of the origin and the progress of the fire. On the contrary the death of the several victims resulted from a succession of causes. The probable location of the several members of the household is established beyond controversy. The building covered quite a large space of ground. That the fire originated in the northwest wing of the building, and took the life of the old gentleman as its first victim, is ascertained to a moral certainty. That the fire was gradually pushed from that room towards the southeast corner of the southern extension of the house by a very strong wind from the northwest is pretty clearly established. That such progress was more or less obstructed by partition walls, ceilings, and doors is equally certain. That such fire naturally, and therefore probably, first advanced from the old gentleman's room into the back hall seems to be morally certain. That James first met the fire in that hall, or at or near the door between it and the kitchen, seems to be an inevitable conclusion from all the evidence. That the children and their mother were not reached by the fire until a subsequent stage in its progress seems probable from the construction of the building and the direction of the wind; and there is no affirmative evidence to overcome such probability. Such being the evidence, we are forced to the conclusion that the finding of the court, to the effect that the three children and their mother all survived the death of James A. Ehle, is sustained by the evidence.

By the Court.—Each and both of the judgments of the circuit court are affirmed. In pursuance of the stipulation of the parties on file, the costs and disbursements of both parties herein are ordered to be paid out of the estates in the hands of the administrator.

IN RE CAHILL.

[74 California, 52.]

CONTEST.—UNDUE INFLUENCE.

Any undue influence is ground for setting aside a will. It is not necessary that it should be by one who is a beneficiary of the will.

APPEAL from an order of the Superior Court of San Francisco, setting aside a verdict.

M. C. Hassett, for the appellant.

William F. Sayers and *Eugene N. Deuprey*, for the respondent.

HAYNE, C. William P. Cahill, a minor, commenced a contest to set aside the will of Ellen Cahill, deceased, on the ground of undue influence. No guardian *ad litem* was appointed to commence the proceedings, the written grounds of opposition being signed with his own name. The proponent filed an answer, in which no objection was made for the want of a guardian *ad litem*. After the issues were settled—Milton C. Babb acting as attorney for the contestant—the matter came up for trial, and then the court, upon petition of the contestant, made an order “that M. C. Hassett be and he is hereby appointed guardian *ad litem* of said William P. Cahill, to appear and act for him in the contest of said William P. Cahill to the proposed last will and testament of Ellen Cahill, deceased.” As will be observed, this order did not purport to relate back to the commencement of the proceedings. So far as the record shows, no objection on account of there being no guardian *ad litem* at the commencement of the proceedings was made at any stage of the trial. The jury found that the will had been obtained by undue influence. The finding on this subject was as follows: “Did the said Ellen Cahill, at the time of signing the instrument offered for probate, sign or execute

the same under undue influence of either James H. Nolan or of Annie Nolan, or of any other person? Answer: Yes." The proponent moved to set aside the verdict, and the court below granted the motion, on the ground of there having been no guardian *ad litem* at the commencement of the proceedings, and upon the ground of the indefiniteness of the verdict. In this latter regard the court said in its opinion, which is printed in the brief of counsel: "It is not specified whether the undue influence was exercised by James H. Nolan or Annie Nolan, or of some other person. This verdict is necessarily too indefinite to warrant any judgment whatever." The contestant appeals from the order setting aside the verdict.

1. We do not think that the verdict was too indefinite to warrant a judgment setting aside the will. It affirmed that the testatrix, in making it, was acting under the undue influence of James H. Nolan or of Annie Nolan, or of some other person. The material point is, that there was undue influence. It is not necessary that the undue influence should have been exercised by a beneficiary under the will. Undue influence by any one, whether he gains by the will or not, is sufficient ground for setting it aside. It is perfectly true, that as an allegation in the statement of the grounds of opposition, it would be too indefinite, if objected to. For it would make it necessary to go over too wide a field of evidence, and there would be nothing to apprise the proponent of the particular case to be made against him. It would therefore be ground of demurrer. The issues submitted to the jury should likewise be sufficiently definite to narrow the case within reasonable limits; and probably in such a case as this, if objection had been made to the form of the issue, the objection would have been allowed. But there was no such objection. On the contrary, the attorney for the proponent expressly stipulated in writing "that the foregoing questions *shall be and are the issues* of the contest in the matter of the estate of Ellen Cahill, deceased." In the face of such a stipulation as this, the proponent cannot be allowed to object to the form of the

issues, unless they are so uncertain as to render it impossible to say what the jury meant by their verdict, which we do not think is the case here.

2. Was the fact that no guardian *ad litem* was appointed for the contestant until the case was called for trial sufficient reason for setting aside the verdict? If this circumstance went to the jurisdiction of the court, and so rendered the proceedings for contest void, there can be no doubt of the correctness of the action of the court below; but if it was a mere irregularity, the proponent should have brought the matter to the attention of the court, and applied for relief as soon as the matter came to his knowledge; he could not go on and take the chances of a verdict in his favor, and keep the objection in reserve. (See cases collected in Hayne on New Trial and Appeal, § 27.) The question stated, therefore, resolves itself into this: Did the matter go to the jurisdiction of the court? We think it did not.

The provision of the Civil Code is, that "a minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same." (Civ. Code, § 42.) And in the Code of Civil Procedure it is provided that "where an infant or an insane person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, in each case." (Code Civ. Proc. § 372.) And directions are given concerning the manner of the appointment. (Id. § 373.) So far as the mere language of these provisions goes, it would seem that the appointment is to be made after the commencement of the suit. But it has been held that the appointment of the guardian must be alleged in the complaint. (*Crawford v. Neal*, 56 Cal. 321.) In this case it was said that the necessity to show the due appointment of the guardian *ad litem* remains as at common law.

The old equity rule is stated by Story as follows: "An infant is incapable by himself of exhibiting a bill, as well on account of his supposed want of discretion as of his in-

ability to bind himself, and to make himself liable to the cost of the suit. When, therefore, an infant claims a right or suffers an injury, on account of which it is necessary to apply to a court of equity, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs; and the person who institutes a suit on behalf of an infant is therefore termed his *next friend* (*prochein ami*).” (Story’s Eq. Pl. § 57.) If the appointment was not made, the defendant could demur or put in a plea in abatement. (Id. §§ 494, 725.)

The common-law rule is stated by Tidd as follows: “An infant, or person under the age of twenty-one years, not being capable of appointing an attorney, must sue by his *prochein ami* or guardian. . . . An infant *defendant* must in all cases appear and defend by guardian. . . . If it appear by attorney, it is error: though if an infant *plaintiff* appear by attorney, it is cured by the statute of jeofails. (Tidd’s Practice, 9th ed. 99.)

It will be observed that the main reason given by these two learned authors is, that the infant cannot appoint an attorney. The appointment of an attorney was one of the acts of an infant which was absolutely void at common law. And our code provides that a “minor cannot give a delegation of power.” (Civ. Code, § 33.) But, as will be remembered, the minor did not appoint an attorney to commence the proceedings here. He commenced them *in propria persona*. It is not necessary, therefore, to consider what would be the result if the contest had been commenced by an attorney for the minor. That is not the case before the court. The act of the minor himself, in submitting to the jurisdiction of the court, and applying to it for relief, does not seem to us to have been of no effect whatever, or in other words, absolutely void; for the acts of minors are in general voidable merely, and are absolutely void only in certain cases. If this be so, then the court had jurisdiction of the person and of the subject-matter; and hence its action, however erroneous, was not void.

In the passage above quoted, Tidd makes a distinction between infant plaintiffs and infant defendants. It would seem that this distinction was made by statute 21 Jac. I. c. 13, § 2, which provided that after verdict for the plaintiff, judgment shall not be stayed or reversed by reason that the plaintiff in ejectment, or other personal action or suit, being an infant under twenty-one years, did appear by attorney therein. (See *Drago v. Moso*, 1 Speers, 212; 40 Am. Dec. 592; *Smith v. Van Houten*, 9 N. J. L. 382.) This difference between action taken by the infant himself, and action taken in hostility to him, may be founded in reason. It was acted on in *Tremper v. Barton* (18 Ohio, 425). It is unnecessary in this case, however, to say what would be the law with reference to infant defendants appearing and defending without a guardian *ad litem*. With reference to plaintiffs, it has been frequently held in this country that the want of a next friend or guardian *ad litem* does not go to the jurisdiction, but is a mere irregularity.

Thus in *Fellows v. Niver* (18 Wend. 563), where a *prochein ami* was appointed after the commencement of the suit, a motion to set aside the proceedings was denied, the court saying: "The only difference between the former statutes and the present is this: Formerly the *prochein ami* was appointed after the issuing of the process, but before a declaration; now it should be done before process, but now, as formerly, it is a question of *regularity* merely, not, as the defendant's counsel supposes, a question of *jurisdiction*. It is a question of practice, and the irregularity may be waived under the present statutes as well as under the old statutes."

So in *Bartlett v. Batts* (14 Ga. 541), where a next friend was appointed for an infant plaintiff after the commencement of the action, the court refused to set aside the verdict, saying: "It seems very safe to say that a suit commenced and prosecuted by an infant alone is not absolutely void; and although defective in wanting a next friend, the defect is one which before verdict is amendable, and after verdict is cured."

So in *Hafern v. Davis* (10 Wis. 502), where the plaintiff signed her complaint in her own name, and proceeded without the appointment of a next friend, the court, per Dixon, C. J., said: "All objections not going to the merits of the action or defense seem to be swept out of existence. Section 40 of chapter 125 provides: 'The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of any such error or defect.' This is evidently an error or defect which does not affect the substantial rights of the plaintiff in error." The foregoing cannot be said to be a decision, for the case was reversed on another ground. The *dictum*, however, was approved and followed in *Sabine v. Fisher* (37 Wis. 376). In that case there was no guardian *ad litem* or next friend appointed for the plaintiff. On the trial, the defendant moved to dismiss on this ground, but the court thereupon appointed a guardian *ad litem*, and denied the motion to dismiss. On appeal the judgment was affirmed, the court, per Ryan, C. J., saying: "There is no error in the leave given to respondent to amend, so as to prosecute the suit by her next friend. Had she proceeded without leave, the judgment could not be reversed on that ground." (*Hafern v. Davis*, 10 Wis. 510.) And the foregoing cases were approved and followed in *Hepp v. Huefner* (61 Wis. 150).

And to the same effect are other cases: *Young v. Young*, 3 N. H. 345; *Blood v. Harrington*, 8 Pick. 554; *Schemerhorn v. Jenkins*, 7 Johns. 373; *Kidd v. Mitchell*, 1 Nott & McC. 334; *Smart v. Haring*, 14 Hun, 276; *Sims v. New York College*, 35 Hun, 344. And compare *Brooke v. Clarke*, 57 Tex. 112.

We do not regard the case of *Townsend v. Tallant* (33 Cal. 52, 91 Am. Dec. 617), as inconsistent with this conclusion. That was a case with reference to a sale of real estate under the direction of the probate court. It may very well be that a special proceeding by an administrator

to divest the heir of title to real property is to be differently regarded.

Nor do we think that section 1307 of the Code of Civil Procedure affects the question presented here, viz., whether the court was right in setting aside the verdict.

3. It is suggested that the court may have set aside the verdict upon its own motion, under section 662 of the Code of Civil Procedure, on the ground that the jury acted "under a misapprehension of the instruction, or under the influence of passion or prejudice." But it is sufficient to say that it appears from the bill of exceptions that the order setting aside the verdict was not made at the time of its rendition, nor was it made upon the court's own motion, but on the formal written application of the proponent. And furthermore, the opinion of the court shows the grounds on which it acted. It is true that this opinion is not a part of the record. But when counsel prints a document in his brief, he must not be surprised if, so far as he is concerned, it is treated as properly before the court. (*Mott v. Reyes*, 45 Cal. 386.)

It may be added, although the point is not distinctly made, that the case cannot be treated as one of a motion for new trial granted, or sustainable on the ground of insufficiency of the evidence to support the verdict. The notice of motion states that it was to be made on the minutes of the court, but contains no specification of the insufficiency of the evidence. In such case, the statute expressly provides that the motion shall be denied. (Civ. Code Proc. § 659, subd. 4.) This being so, the contestant was not required to insert any evidence in the bill of exceptions settled after the order.

We therefore advise that the order be reversed, and the cause remanded, with directions to the court below to enter judgment upon the verdict in favor of the contestant.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion, order reversed and cause remanded, with direction to the court below to enter judgment upon the verdict in favor of the contestant.

See, also, *Sunderland v. Hood*, 5 Am. Prob. Rep. 433, and the note; *Yardley v. Cuthbertson*, Id. 562, and the note.

IN RE ZEILE.

[74 California, 125.]

WILL AND CODICILS.—ADVANCEMENTS.—SPECIFIC LEGACIES.

Where certain shares of bank stock are given by will to relatives of the testator, and it is provided in the will that any advances to the legatees shall be deemed a partial satisfaction of the legacy of stock, the gift of the bank stock is a specific legacy, and a subsequent gift by codicil of a sum of money is cumulative, and not an advancement within the meaning of the will.

APPEAL from a judgment of the Superior Court of San Francisco.

J. B. Reinstein and *J. M. Seawell*, for the appellant.

Selden S. and *George T. Wright*, *Joseph P. Kelly*, *Sawyer & Burnett*, and *S. Heydenfeldt*, for the executors.

Edmund Tauszky, *M. S. Eisner*, and *William Loewy*, for certain legatees.

McKINSTRY, J. Deceased died at Monte Carlo, Monaco, April 26, 1884, being then a resident of San Fran-

cisco, and leaving property in that city and county. He left a will, executed and published in this State on the 19th of May, 1883, which was duly probated in San Francisco, a portion whereof reads: "Item 6. I give and bequeath unto my relatives residing in Germany one thousand (1,000) shares of the stock of the Bank of California, the same to be sold by my executors at or as soon after my decease as is practicable, for its reasonable value, and the proceeds to be divided as follows, to wit:—

"To my sister, Mathilde, one-fourth ($\frac{1}{4}$).

"To the children, residing in Germany, of my brother David, one-fourth ($\frac{1}{4}$), share and share alike.

"To the children of my dead sister, Mrs. Maier, one-fourth ($\frac{1}{4}$), share and share alike. To the children of my dead sister, Mrs. Froescher, one-fourth ($\frac{1}{4}$), share and share alike.

"And I hereby declare that any advancements that I may hereafter personally make to the above-mentioned legatees, or to either of them, shall be deemed a partial satisfaction of said legacy, equal in amount to the sum so advanced, and I direct an equal amount shall be deducted from the proceeds of the sale of bank stock and added to my residuary estate."

Subsequent to the execution of the will in California, decedent left for Europe, and at Rottweil, Wurtemberg, on the 17th of August, 1883, made a supplemental will, or codicil, portions whereof read:—

"I. I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same.

"II. However, I have already made arrangements to have a sum of money sent from California to a bank in Germany or Wurtemberg, of which I shall dispose in favor of other relatives. The following sums of money shall be paid:—

"1. To my sister, Mathilde Zeile, unmarried, at Reutlingen, sixty thousand (60,000) marks.

"2. To my brother, David Zeile, of the town of Weil, fifty thousand (50,000) marks.

"3. To the wife of the tanner Hummel, at Reutlingen, whose first name at this moment I do not remember, daughter of my deceased sister, whose name I do not just now recall, formerly widow of the baker Maier of Tubigen, seventy-five thousand (75,000) marks.

"4. To the children of my deceased sister, Gottlobin, formerly wife of the tanner Froesher, of Reutlingen, to wit:—

"(a) To the son, who is tanner in the upper country, and is married, whose first name is at this instant unknown to me, twenty-five thousand (25,000) marks.

"(b) To her daughter Paulline, now living, widow of the architect Fuchs, at Reutlingen,—that is, to each of the children of this marriage, minors, whose names are at this instant unknown to me,—twenty thousand (20,000) marks; with proviso that the income is to go to the children, and that there shall be a guardianship of the estate until they become of age or marry.

"(c) To her daughter, Mathilde, now living, wife of the manufacturer Haux, at Reutlingen,—that is, to the children born and to be born of this marriage (there are four children at present),—jointly (50,000), fifty thousand marks; with the proviso that the income goes to the children; that there shall be a guardianship of the estate until they arrive at the age of majority, or until they marry; and that at that point of time they are to receive their shares; that in case of the possibility of other children being born, the guardians' court will have to determine how such shall be paid over; and also with the further proviso that if one of these children should die during the age of minority, the share of such child shall go to his brothers and sisters. The children living shall hold in trust for the children born hereafter.

"III. All the personal property of any kind, as well as money which I shall leave in Germany at my decease, beyond that of which I have disposed in the foregoing para-

graph, shall go to the four branches named in the foregoing paragraph, in such manner that only those mentioned in the foregoing paragraph shall be entitled, and that those of each branch are to share with each other in the proportion of the sums given them in the foregoing paragraph.

"IV. If, unexpectedly, the funds in Germany should be insufficient for the purpose of paying the sums in paragraph 2, then the heirs of the estate in California shall supply the deficiency.

"VII. All bequests which I have made, or which I shall make, shall by this last testamentary disposition be expressly confirmed, whether these bequests are given to relatives, strangers, or for charitable purposes and institutions. Likewise, any testamentary papers written or subscribed by me shall have the same effect as if they were here incorporated."

On application for distribution of the proceeds of the bank stock,—which had been sold by the executors by order of the court,—the Superior Court found that no part of such proceeds had been paid to Mathilde Zeile, sister of testator, or to Marie M. Hummel, daughter of testator's sister, Mrs. Maier, or to Karl Froescher, son of the sister of testator, Mrs. Froescher. Also that the sum bequeathed to Marie M. Hummel, appellant, by the Rottweil will, or codicil, was more than her share of the proceeds of the bank stock.

And the court held that the sums of money bequeathed by the Rottweil will, or codicil, to the persons mentioned in item 6 of the California will were intended by the testator to be, and were, "advancements," within the meaning of the term as used in item 6, and should be deducted from the legacies given to the same persons in that item.

The superior court treated the legacies given by item 6 of the California will as "specific legacies," and no question has been made by either party as to the correctness of that ruling. The thousand shares of bank stock were to be sold by the executors, and the proceeds divided among the legatees named. The dividends collected by

the executors were incidents to the stock, and were, of course, to be distributed in like proportions with the proceeds of sale. The will did not merely provide that sums of money should be distributed to the legatees, payable primarily out of the fund arising from the sale. The legacies were not merely demonstrative: they were specific; if the shares of stock had become worthless, the legatees would have been entitled to nothing.

There is no question of *ademption*, in the strict sense, here. The specific thing has never been taken away; the bank stock continued to be a portion of testator's property until his death, and was a part of his estate afterward.

But the first question, as applied to this appeal, is, What was the specific legacy left to Marie M. Hummel?

The legacy to her was not of one-eighth ($\frac{1}{8}$) of the proceeds of the one thousand shares of bank stock, absolutely; but of one-eighth, less the amount of any "advancements" the testator might "personally make" to her after the execution of the California will.

Whatever the nature of the "advancements," they were to be personal acts of Frederick Zeile in his lifetime.

It would seem plain, also, that, whether or not the execution of a will containing provisions like those last above recited was intended by the testator—when the California will was made—to constitute an "advancement" to appellant of an amount equal to the legacy to her named in such an instrument, must depend upon the language of the California will, and the effect of oral testimony if any, properly admissible, to explain the intent of the testator when the California will was made.

Whether the legacy to appellant in the first instrument was satisfied by a bequest in the subsequent instrument (intended as a substitute for that legacy) is a different question. The California will was republished at Rottweil, and all its provisions reaffirmed and ratified.

Unless the term "advancements" of itself included a legacy mentioned in a subsequent codicil, or the language

of the second instrument, in connection with that of the first,—or of such language with oral testimony, properly admitted, to explain the first instrument,—shows the testator intended the second legacy to be in substitution or satisfaction for the legacy in the California will, the second legacy must be held to be cumulative. It is well settled—except where the two legacies are for the same sum, and both testamentary instruments express the same motive for the gift—that, where a testator gives a legacy of quantity, *simpliciter*, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary.

Whether the testator meant when he used the word “advancement” that any legacy he might give in a subsequent will or codicil to one of the persons named in item 6 should be deemed an advancement is to be determined by reference to the language of the California will, and the evidence showing the circumstances surrounding the deceased when he made that will.

Whether, when he provided a legacy for appellant in the Rottweil will, he intended the same as a substitute for the legacy left her in the California will, and not as cumulative, is to be determined by reference to the language of the Rottweil will, or of the Rottweil and California wills together, in the light of the testator’s then surroundings, and of events (so far as evidence of such was admissible) which preceded its execution.

Prior to our codes, the term “advancements” was applied to gifts by a parent (in his lifetime) to a child, of the whole or a part of what it is supposed the child would inherit from the parent; sometimes, also, to such gifts by one standing *in loco parentis*. By the Civil Code, the term is extended so as to include like gifts by an ancestor to a child, “or other lineal descendant.” (Civ. Code, §§ 1395–1399.)

It may be conceded, as claimed by respondents, that the word is not employed in item 6 as in the provisions of the

Civil Code. It by no means follows, however, that the testator intended the word to embrace any legacy to one of the same persons which he might give by a subsequent testamentary instrument not revocatory of the will in which the word is found.

Webster gives as definitions of *advancement*, "the payment of money in advance; money paid in advance." A payment in advance implies a payment *beforehand*,—before an equivalent is received, or before the happening of an event in the contemplation of the parties to a contract. When used in a will, unless another event is mentioned prior to which the advance is to be made, or the context otherwise indicates a different meaning, the words "payments in advance, to be applied in satisfaction of a legacy," import payments prior to the happening of the event on which the will is to take effect, to wit, the death of the testator.

Counsel for respondents cite Professor Pomeroy's work on Equity Jurisprudence as authority for the proposition that the legacy to appellant in the Rottweil will was an *advancement* within the meaning of the word as used in the California will. The learned writer, speaking of the effect of a legacy in a will made *after* a settlement on a child, says: "The settlement or agreement to give a portion may sometimes contain a provision to this effect: that if the parent should afterward, during his lifetime, make an advancement to the donee, such advancement should be a complete or partial satisfaction of the portion. If, instead of making a technical advancement, the parent should afterward, by his will, leave a legacy or a residue, the legacy given under such circumstances is held to be a compliance with the provision, and to operate as a satisfaction in full or in part of the portion." (1 Eq. Jur. § 567.) He cites in a note *Onslow v. Mitchell* (18 Ves. 490); *Noel v. Lord Walsingham* (2 Sim. & S. 99); *Fazakerly v. Gillebrand* (6 Sim. 491); *Papillion v. Papillion* (11 Sim. 642).

We have not had access to the Irish report, but it would seem the English cases, although they appear to do so,

when examined and explained do not support the text. (See *Cooper v. Cooper*, L. R. 8 Ch. App. 825, 826.)

However this may be, Mr. Pomeroy shows very clearly in another place that the doctrine of presumptions, applicable with respect to the dealings of a *parent* as to a *child*, has no place in cases like the present. (1 Eq. Jur. § 548.)

Lord Romilly, M. R., said: "It is of paramount importance to consider in all cases . . . whether the doctrine of presumption against double portions, or the doctrine of construction of instruments, applies. . . . If the original gift was to a stranger, the doctrine of satisfaction becomes applicable according to the words of the original donor." (L. R. Ch. 8 App. 819, note.)

In the case before us, the testator might have used language to indicate that by "advancement" he meant, not only a gift of money or property prior to his death, but also a subsequent bequest to a legatee named in the California will. But in the absence of such language, there is no *presumption* that he used the word in a sense differing both from its technical and popular signification. As it was not employed as a technical term, the presumption is, he employed it in the sense approved in general literature and by common usage. The language in immediate connection with "advancements" strengthens rather than weakens the hypothesis that the testator intended a gift in his lifetime,—“Any advancements that I may hereafter *personally* make,” etc.

It is true, a subsequent codicil would be made by him, and made by him in his lifetime. But the words, while apt and appropriate in respect to gifts consummated in his lifetime, are such as would not ordinarily or “naturally” be resorted to when the testator was speaking of gifts to take effect only on his death. In the latter case, the substance of the thing to be conferred would not be delivered by the testator personally, but by his executors after his decease.

The testimony of the witness called by the parties contesting the application of appellant and others (respond-

ents) did not establish, or tend to establish, that the word "advancements" was used to designate or include any subsequent legacy to appellant. The witness said:

"I was about two months in draughting said will, as the doctor [testator] made frequent changes, and I had to rewrite it. It took him a long time to make up his mind about some of his property. When he came to the matter of these German heirs, he seemed already prepared. The one thousand shares of the capital stock of the Bank of California he designed for them; and he proceeded to divide it up just as it is written in the will, four families, each one quarter.

"After I had written and read it to him, he remarked that when he arrived in Germany he intended to give some money to such of his relatives there as might need it, to distribute some money among them, and whatever that amount might be to either of them must come out of their share of the proceeds of the bank stock. It was under that instruction that that clause was framed. The will was not signed when completed. He kept it a couple of days examining it, but made no remarks to me that I remember. He made the statement about the German heirs. He seemed to be prepared, and settled it as above stated. Before the will was executed he wanted Judge Heydenfeldt to read the will. He came and read it. Judge Heydenfeldt said it was all right. I am under the impression the doctor used the word "distribute" in reference to the German heirs. He said: 'Distribute some money among these people.'"

The statement of decedent to witness, that "when he arrived from Germany" he intended "to give" or "distribute" some money to or among such of his relatives there as might need it, accords at least as well with a purpose to make presents to such relatives personally as with an intention to make different and substitutionary testamentary provision for such of them as he had named in his will. It is significant that in terms he expressed no intention of providing for his relatives in Germany by supplemental

will or codicil. There is no suggestion in the testimony of Taft that deceased entertained such intention. It cannot be derived from the word "distribute," a word appropriately applicable to an allotment or division of money among the German relatives by the testator in his lifetime.

Our conclusion is, that when the California will was made and published, the deceased intended that the legacies mentioned in item 6 should be reduced only by actual payments made by himself personally; that is, in his lifetime.

The evidence shows that the decedent took with him when he left for Europe about thirty-five thousand dollars, and that he afterward wrote for, and there was sent him by his agent, the witness Taft, one hundred and twenty-five thousand dollars. Decedent wrote for the last sum at Nice, December 22, 1883, but in his letter stated that he had already directed his agent to send him "every two or three months all the cash on hand."

The court below found that Taft, testator's agent, sent the one hundred and twenty-five thousand dollars from San Francisco on the sixteenth day of January, 1884, and that on the 23d of the same month he sent another sum of five thousand dollars. When the California will was made and published, the testator intended that any sum of money he might personally give to the persons named in item 6 should be deducted from the legacy to such persons. His language proves, at least, that he then contemplated the probability of such advances. Neither the fact that the decedent caused very large sums of money to be placed in Europe, nor his letter of December 22, 1883, indicates any change of his original purpose to make gifts or advances personally to some of those mentioned in item 6.

Can we say his intention was changed or modified prior to the making of the Rottweil will?

"Although two bequests may be made to the same person, and although these bequests may differ in their amounts, incidents, and forms, . . . still the special language used by the testator in making the second gift,

or the language *found in other parts* of the will, may sufficiently show his intention to give the second legacy for or in satisfaction of the prior one. . . . It is impossible to lay down any general rule governing such cases; each case must stand upon its own circumstances. The question is, then, simply one of interpretation in order to ascertain the real intent of the testator. But in arriving at this intent, the court will if necessary look at all parts of the will. The court may also be called upon to interpret the testamentary language rather than to apply any rule of presumption when the second instrument,—e. g., the codicil—*expressly refers to the former one*. The terms of the second instrument—perhaps codicil—may be such, *when all taken together*, as to show an intent that the second gift was to be in substitution or in satisfaction, and not cumulative.” (1 Pomeroy’s Eq. Jur. § 548.)

Paragraph 1 of the Rottweil will reads: “I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same.” And in paragraph 7, the testator confirms all bequests which he had already made, and declares that any testamentary papers subscribed by him shall have the same effect “as if they were here incorporated.”

The two instruments are therefore to be read as one writing; the whole expressing the intent of the testator at the date of the Rottweil will,—so far as his intent appears from the writing,—with regard to the disposition of his property.

There may be some significance in the circumstance that, after a large amount of money had been sent to him, which he might, perhaps, have given to or distributed among his relations “personally,” the testator did not make such personal donations, but proceeded to prepare a codicil wherein he inserted bequests to some of the persons named in item 6. This fact, however, if it can be considered at all, should have little weight in any inquiry the purpose of which is to ascertain whether the testator then,

at Rottweil, intended that the term "advancements" should include the second legacies. The suggestion is but conjectural that he may have meant what his language does not imply. It is as easy to suppose the testator changed his mind, and decided to give to some of those named in item 6 further and cumulative bequests out of the moneys sent to Europe, as that he determined such further bequests should be treated as "advancements."

We may conjecture that finding himself growing more ill, his decease perhaps imminent, and believing he would not be able "personally" to distribute the moneys, he concluded to make the *advancements* by new bequests. On the other hand, we may conjecture that, returning after long absence to companionship with some of his earlier friends, to whom he was connected by the ties of kindred, his surroundings recalling in his old age the home of his childhood, and all its endearing associations, he may have decided to make provision for some of his relatives in addition to that made by the California will. But all such surmises are more or less fanciful, since they are not based upon the language of the instruments, and are built on presumptions rather than evidence,—presumptions of facts from which different inferences may be drawn, as prominence is given to some or the other of them.

By paragraph 7 of the Rottweil will the California will is to be treated as "incorporated" in the former. Item 6 of the California will contains the provision: "Any advancement that I may hereafter personally make [to the legatees named in the item] shall be deemed a partial satisfaction," etc. Not only did the testator fail to declare, in express terms in the Rottweil will, that the legacies therein given to those named in item 6, should satisfy, in whole or in part, the former bequests, but it may have said he reaffirmed his desire that those bequests should be reduced only by advancements he might "*hereafter* personally make." The force of this suggestion is, however, by no means conclusive. When it is said that the two instruments are to be read as one, it is not to be assumed that

literal effect is to be given to every clause of both. This may not be possible without violating the reasonable rules of interpretation applicable to every writing. If it satisfactorily appear—from other portions of the wills—that the Rottweil legacies were intended to satisfy, fully or *pro tanto*, those given in item 6, the provision in that item as to advancements may be disregarded; or the language used at Rottweil, read with the first will, may show that—whatever its meaning disconnected from the Rottweil will—the testator, at the time the Rottweil will was made, intended the word “advancements” to cover the Rottweil legacies.

In paragraph 1 of the will or codicil made at Rottweil the testator declares: “I have already disposed by testament of my estate in California. That testamentary disposition shall remain unchanged, and I again ratify the same.” The bank stock was part of the estate in California, and so far as appears on the face of the instrument, the whole purport and intent of the Rottweil will was to make disposition of the moneys he had arranged to have sent to “Germany or Wurtemberg.” In paragraph 2, immediately after ratifying the disposition of the California will, the testator says: “However, I have already made arrangements to have a sum of money sent from California to a bank in Germany or Wurtemberg, of which I shall dispose in favor of other relatives. The following sums of money shall be paid.” He then proceeds to bequeath sums to relatives residing in Germany, some of whom were given legacies by item 6 from his “estate in California,” and some of whom were not mentioned in the California will.

We find nothing to indicate that the legacies given to such of the donees as were mentioned in item 6 were not to be additional or cumulative unless it be in the expression “of which I shall dispose in favor of *other relatives*.” Now, the sums given by the testamentary instrument executed at Rottweil to Mathilde Zeile, testator’s sister, and to his niece, the appellant, were given absolutely. Whether they were intended as “advancements” or not, the right to them (subject to administration) vested unconditionally on the

death of Frederick Zeile, except so far as the rights of those named in item 6 of the California will might be limited by the happening of the unexpected contingency spoken of in paragraph 4 of the Rottweil will. Whenever the second legacy is regarded as substitutionary and not as cumulative, the satisfaction of the prior legacy—to the extent of the second—is absolute; the former legacy—to that extent—creating no light in the legatee, there is no claim of an election between the two on his part.

When, therefore, the testator proposed to dispose of the moneys sent to Europe to “other relatives,” he could not have intended to exclude from his bounty those to whom it was expressly extended. Yet some of those to whom legacies were given by the Rottweil will were not named in item 6 of the California will. Those were the *other* relatives, and the clause can only be read as intended to give legacies, from the sums sent to Europe, as well as to those to whom donations were made by item 6 as to the “other relatives” mentioned.

In paragraph 4 of the Rottweil instrument the testator provided for an event which he regarded as possible, although not probable, and which never came to pass. If, unexpectedly, the funds in Germany should be insufficient to pay the sums in paragraph 2, the heirs of the estate in California were to make up the deficiency. In paragraph 5 he applied the word “heirs” to legatees. But if in paragraph 4 he intended to include in the word “heirs” all the devisees and legatees named in the California will, there is nothing in the language which indicates his purpose that the bequest in paragraph 2, or the residuary interests given by the Rottweil instrument, should be “advancements” in satisfaction of the legacies of the item 6 of the California will.

Starting, then, with the presumption that the second legacy to appellant was intended to be cumulative, unless the language used by the testator shows it was to be in substitution, does the language of the testator overcome this presumption? As we have attempted to show, the

term "advancements" does not of itself, either in its technical or in any popular sense, cover a subsequent legacy; and after a careful examination of the language of the two instruments published at Rottweil, we have been unable to discover therein an intention upon the part of the testator that the word should bear such peculiar signification as that its scope should include the Rottweil legacies, or any intention that those legacies should satisfy, in whole or in part, the bequests of the proceeds of the bank stock.

Judgment and order reversed, and a new trial granted to appellant Marie M. Hummel.

TEMPLE, J., and PATERSON, J., concurred.

Hearing in bank denied.

Of cumulative and substitutionary legacies.—In general, where two legacies of quantity are given *simpliciter* to the same person by different instruments, the presumption is, that they were intended as cumulative, and not that one should be a substitution for another; and very slight circumstances have been considered as sufficient to show a testator's intention either one way or the other. *Ridges v. Morrison*, 1 Bro. Ch. 341; *Foy v. Foy*, 1 Cox, 168; *Baillie v. Butterfield*, 1 Cox, 392; *Reay v. Hopper*, Rolls, Mich. Term, 1785; *Jackson v. Jackson*, 1 Bro. Ch. 420; *Coote v. Boyd*, 2 Bro. Ch. 521; *James v. Semmens*, 2 H. Bla. 213; *Allen v. Callow*, 3 Ves. 289; *Barclay v. Wainwright*, 3 Ves. 462; *Osborne v. The Duke of Leeds*, 5 Ves. 369; *Benyon v. Benyon*, 17 Ves. 34; *Currie v. Pye*, 17 Ves. 465.

In *Hurst v. Beach*, 5 Madd. 351, a leading case in point, by the will of B. Heath, dated the 2d January, 1812, several legacies were given, and the will proceeded thus:—"I also give and bequeath to John Beach (meaning the said John Beach), now living with me, the sum of £300, all of which said legacies I direct and desire may be paid immediately after my decease, and bear legal interest from my death till paid."

By a codicil to her will dated the 11th day of February, 1814, the testatrix after giving several legacies of £500 each, gave "to my man servant, John Beach, a like legacy or sum of £500." The testatrix then gave a like sum of £500 to her maid servant, and all these legacies she directed to be paid at the end of six months after her decease.

The testatrix died on the 15th February, 1814, the bill was filed by the executors, and prayed that the defendant might be decreed to deliver up the mortgage of the 18th October, 1813, and all deeds, etc., in his possession relating to the mortgaged premises, and that the legacy of £500 bequeathed by the codicil to Beach, might be declared to be given in lieu and satisfaction of the legacy of £300 left by the will.

The first question was, whether the delivery of the mortgage and bond, and the title deeds, operated as a legacy *mortis causa*, or as a release of the mortgage debt. The next question was, whether the legacy by the codicil was accumulative, or substitutional; and lastly, whether evidence was admissible to prove that the testatrix did not mean that the defendant should take both legacies.

Upon the latter questions the Vice-Chancellor said:—"Where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same person, the Court considering that he who has twice given, must *prima facie*, be intended to mean two gifts, awards to the legatee both legacies, and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first. But if in such two instruments the legacies are not given *simpliciter*, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the Court considers these two coincidents as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift. The Court raises this presumption only where the double coincidence occurs, of the same motive, and the same sum, in both instruments. It would not raise it, if in either instrument, there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different. The presumption cannot therefore be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different, and upon the face of the instruments the defendant is entitled to both sums. This reasoning has no application to cases where the second instrument affords intrinsic evidence that it was intended by the testator in substitution of the first instrument, as in the cases of the Duke of St. Albans v. Beauclerk, 2 Bro. Ch. 521; and the late case of Attorney General v. Harley, 4 Mad. 263."

Hooley v. Hatton, 1 Bro. C. C. 390, reviewed and approved in Wilson v. O'Leary, L. R. 12 Eq. 525, 531, is one of the most important cases on this subject, and from the clearness of the terms in which it is expressed, one of the most satisfactory. By the will in that case the testatrix gave to Lydia Hooley, "her woman," a legacy of £500. By a codicil dated somewhat more than a year later, the testatrix said: "I add this codicil to my will; I give Lydia Hooley £1,000." The question was, whether Lydia Hooley took the two legacies or only the last.

The rules laid down in the judgments in that case were: (1.) That where there is no internal evidence furnished by the instruments themselves, the general rules of law must be referred to. (2.) Where the same specific thing is given twice, it can take place but once. (3.) Where the like quantity is given twice, but by different instruments, the legatee is entitled to both. (4.) As to a less sum in the later deed—£100 by the will and £50 by the codicil—the legatee shall take both. (5.) As to a larger sum after a less, “the law seems to be, and the authorities only go to prove the legacy not to be double, when it is given for the same cause and in the same act, and *totidem verbis*, or only with a small difference, but when in different writings there is a benefit of equal, greater or less sums, it is an augmentation.”

On the other hand, in *Garth v. Meyrick*, 1 Bro. Ch. 30, two legacies of £1000 each were given in the same will to the same legatee; the first bequest was, “I give to (Mary Garth) £1000, old South-Sea annuities, to be transferred into her own name; and then towards the close of the will, I give to (Mary Garth) £1000, old South-Sea annuities as aforesaid.” It was endeavored to support these as separate legacies, and that the legatee should take both, but not allowed.

So, also, in *Greenwood v. Greenwood*, 10 Serj. Hill’s Mss. 437, before Lord Bathurst, Jan. 25, 1776, s. c. 1 Bro. Ch. 31, note. Hester Joyce by will, dated 20 February, 1773, gave “to her niece Mary Cook, wife of John Cook, £500,” and afterwards, in the same will, among many other legacies “to her cousin Mary Cook, £500, for her own use and disposing, notwithstanding her coverture.” His Lordship declared, that Mary Cook was entitled to one legacy only, of £500, and that the same was for her separate use. The cause was reheard upon this point, 16 Dec. in the same year, and the decree confirmed.

See, also, *Metcalf v. First Parish in Framingham*, 1 Am. Prob. Rep. 11; *Wright’s Appeal*, Id. 125; *Van Houten v. Post*, Id. 422; *Allen v. Allen*, Id. 479; *Porter’s Appeal*, 2 Id. 234; *Kunkel v. Macgill*, Id. 132; *Fennell v. Henry*, 3 Id. 216; *Simpson v. Simpson*, 4 Id. 435; *Fidelity Trust Company’s Appeal*, Id. 556.

MATTER OF CORRINGTON.

[124 Illinois, 363.]

EQUITABLE CONVERSION.—A BEQUEST OF MONEY NOT A DEVISE OF LAND.

Where a testator, by his will, directs the sale of his land by the executor, and the division of the proceeds equally among the testator's children, this will be a devise of money and not a devise of land; and the executor may be held responsible for the value of the land, when he corruptly, or through gross negligence, sells the same for less than its value. The county court may therefore charge him, on final settlement, with such a sum as he might have realized by reasonable care and diligence.

APPEAL from a judgment of the Appellate Court for the Third District. The facts are fully disclosed in the opinion.

Ketcham & Hatfield, for the appellant.

Patton & Hamilton, for the appellees.

SHOPE, J. The executor of the last will of Joel Corrington, deceased, on May 23, 1883, presented to the county court of Morgan county his report as executor, in which, among other items, he charged himself with \$2,389.20 received from J. B. Corrington for 79 $\frac{1}{4}$ acres of land, and \$5,860.80 received from William Corrington for 195 $\frac{3}{4}$ acres of land, sold by said executor to said parties, respectively. To this report exceptions were filed, none of which are before us by this appeal, except the fourth, which was an exception to the said items for the sale of said land, because the sales, as reported, were for a sum greatly less than the actual cash value of said lands, and less than the executor might reasonably have realized therefrom. The county court sustained this and other exceptions, and upon appeal to the circuit court said fourth exception was again sustained, and the executor ordered by the court to charge himself with the additional sum of \$2,750, being the amount found by that court to have been charged less than the executor

should have realized from the sale of said land. Upon the last appeal the finding and order of the circuit court were affirmed by the Appellate Court, and the executor prosecutes this further appeal.

The jurisdiction of the county court to require the executor to account in respect of this item is questioned. The contention is, that where an executor is empowered by the terms of the will to sell real estate, the court may require him to execute the will in that respect; but when a sale is made and reported, the authority of the probate court is at an end, and resort must be had to a court of chancery, by the party injured, to correct an abuse of the trust, or for relief.

The courts of probate, in the settlement of estates and the adjustment of the accounts of executors, administrators and guardians, exercise equitable jurisdiction, so far as may be necessary to adjust the same. (*Dixon v. Buell*, 21 Ill. 203; *Hurd v. Slaten*, 43 Id. 348; *Wadsworth v. Connell*, 104 Id. 369; *Millard v. Harris*, *Exr.* 119 Id. 185.)

The land mentioned as sold, in the report of the executor, was, by the will of Joel Corrington, deceased, duly admitted to probate, devised to be sold by said executor, and the proceeds thereof divided equally among the testator's six children, named in the will. The intent of the testator to devise the money arising from the sale of said land is clearly expressed. There was here, then, a devise of money, and not of land. It was said in *Fletcher v. Ashburner* (1 Bro. C. C. 497), "that nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted." (*Williams on Executors*, 414, *et seq.*; *Wheldale v. Parkridge*, 5 Ves. 396; 2 Story's Eq. 212-214.) Where, as in this case, a will requires real estate to be converted into money, and there is no election by the devisee to take the real estate directed to be converted, it is to be considered as converted from

the time of the testator's death. (*Wurt's Exrs. v. Page*, 4 C. E. Green, 365; *Dodge v. Pond*, 23 N. Y. 69.)

The principle that a testator may thus impress upon real estate the character of personalty, and that whoever takes the property under the will takes it in the character thus impressed upon it, has been repeatedly held by this court. (*Baker v. Copenbarger*, 15 Ill. 103; *Jennings v. Smith*, 29 Id. 116; *Rankin v. Rankin*, 36 Id. 293.) In equity, at least, this devise was of a fund distributable by the executor to the devisees named in the will, and, as such, was in his hands by virtue of his office, and which he must account for under the direction of the probate court. By the will the executor was clothed with discretion as to the time and manner of making sale of these lands, but he must exercise such discretion with fidelity to the interests of the beneficiaries, and in a reasonable and prudent manner. Having accepted the trust, he was bound to execute it with integrity, and while he cannot be held liable for mistake in matters of judgment or opinion, where ordinarily prudent business men might be alike mistaken as to what was for the best interests of the estate, it was his manifest duty to make a fair and honest sale, for the best price reasonably obtainable. He was required to act in good faith, and with that degree of reasonable diligence ordinarily employed in like business affairs by men of common prudence, and if, from his failure to do so, injury and loss occurred to the distributees under the will, he must make good the loss so occasioned. Acts of negligence in respect of the control or disposition of the estate, careless administration of it, or a willful disposition of the assets of the estate, whereby the rights of creditors or legatees, or parties entitled in distribution, are defeated, amount to a *devastavit*. While no person is required by law to accept the trust of the execution of a will, yet if one does accept, he must perform it, using due and reasonable care and diligence to prevent loss to the estate. (*Whitney, et al. v. Peddicord*, 63 Ill. 249; *Williams on Executors*, 1804-1816; *Lomax on Executors*, chap. 4, § 3.) If, then, the executor, either through bad faith or

by failure to exercise reasonable diligence, diminished the funds in his hands for distribution under the will, he should be required to account for it, and the probate court is clothed with ample jurisdiction and power to compel a just and true accounting, and to require him to charge himself with the deficit.

It is also contended that the evidence does not warrant the finding. The fund coming to the hands of the executor was, in respect to the matter being considered, to be measured by the amount for which the lands might have been sold by the exercise of reasonable diligence and prudence by the executor. He is shown to have refused an offer of \$33 per acre for the land, which he shortly after sold to his sons for \$30 an acre. The excuse given for not accepting the offer made was, that it was in part on time, and he preferred to sell for cash. If this was so, it is apparent that he sold to his sons wholly on time, and when cited by the court to account, advanced the money from his own pocket to make the payment for the land at \$30 per acre. It appears that on various occasions, prior to the sale to his sons, he was applied to by persons, some of whom wished to purchase, for the price at which the land could be purchased. To some of these persons he stated the lowest price at \$45, to others \$50 an acre, and refused to take \$40 an acre when applied to by the witness Harrison Robinson, in the fall of 1881 or spring of 1882. It appears from the testimony of a number of witnesses, whose means of knowledge seems ample, that the lands were worth not less than \$40 an acre, and could have been sold for that price, while some of the witnesses put its value as high as \$45 and \$50. The executor, however, at private sale, without advertising the land, or otherwise, so far as appears, attempting to attract purchasers, sold the two tracts mentioned, in the spring of 1882, to his sons, at \$30 an acre. It is true, the evidence is conflicting as to the value of the land; but as already said, the probate, circuit and Appellate courts have found that the preponderance of the evidence supports the contention that \$40 an acre could have

been realized by the executor with the exercise of reasonable diligence and a proper regard for his duty in the execution of the trust imposed on him by the will, and we are unable to say there is error in this respect.

There are other minor objections urged, one of which, only, will be noticed. The court below taxed the costs of this investigation against the executor, personally, and this is assigned as error. The costs were in the discretion of the court, and we are not prepared to say the discretion was abused. If the willful misconduct of the executor, or his gross negligence in conducting his trust, rendering litigation necessary for the preservation of the rights of the distributees, it is manifestly just that he should bear the expense, rather than it should fall upon them.

We find no error in this record authorizing a reversal, and the judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

See, also, Peterson's Appeal, 1 Am. Prob. Rep. 187; *Power v. Cassidy*, Id. 368; *Jones v. Caldwell*, 2 Id. 154, and the note; *Lent v. Howard*, 3 Id. 109.

PERKINS vs. JONES.

[84 Virginia, 358.]

HOLOGRAPHIC WILL.—CODICIL.

A will wholly written, signed and sealed by the testator, who is of sound mind, containing an attestation clause unsigned by witnesses, is valid; and another paper of a testamentary character bearing same date, and found folded up with the will and written and signed by the testator, is a valid codicil, though it does not refer to the will.

Error to judgment of circuit court of Albemarle county, rendered May 27th, 1887, in the case of John N. Perkins, propounder of the will of Jesse W. Jones, who died May 31st, 1886, against Maria C. Ayers, Annie M. Furrow, Emma W. Edwards, and Jesse P. Jones, contestants. This proceeding began in the county court of said county, where the decision was adverse to the propounder of the will. On appeal the circuit court also rejected the will, and the propounder obtained a writ of error and *supersedeas* from one of the judges of this court. The opinion states the case.

Davis & Harman, for the plaintiff in error.

S. V. Southall and *S. B. Woods*, for the defendants in error.

LACY, J. This case is a contest concerning the will of Jesse W. Jones, of Albemarle county, who died on the thirty-first day of May, 1886. In September, 1886, on the sixteenth day of that month, the will was found upon the premises of the testator, among a large quantity of papers, in an outhouse, where the papers had been piled preparatory to a change of occupancy of the premises. These papers were at first in an old trunk, into which such a quantity of the said papers had been put, and the top so pushed down, as to burst the top off; and the papers being subsequently turned out of the trunk, as is supposed, this paper was found on the top of a large pile of the said papers. The will is dated the 14th day of May, 1862; is wholly in the handwriting of the testator; is signed and sealed by him. At the bottom is an attestation clause, unsigned by witnesses. Folded up in the will was a short paper writing, dated on the same day that the will is, and signed by the testator. This also is wholly in the handwriting of the testator, as is proved in the case, and a newspaper slip containing an obituary notice was also folded up in the will.

The will makes an unequal disposition of the property among the testator's children in some respects, and its pro-

bate was resisted by all the children aforesaid, except one who is the wife of the executor named in the will, who is the propounder of the same, and is the appellant here, John W. Perkins. The county court rejected the will; and, on appeal to the circuit court, the case was tried, and the will again rejected; whereupon the case was brought here by writ of error. The facts proved are certified, and it appears to have been proved that the will, and the inclosed paper claimed to be a codicil, are both, including the signatures, wholly in the handwriting of the testator; that the testator was seventy-three years of age at the time of his death, and that he was for some months next preceding his death in delicate health, but that *his mind was unimpaired*.

The first assignment of error here is the refusal of the court to give the following instruction asked by the plaintiff, the propounder of the will: "If the jury believe, from the evidence, that the paper writing No. 1 [the will] offered for probate is altogether in the handwriting of Jesse W. Jones, and signed by him, they must find that said paper writing is a good and valid last will and testament, provided they also believe from the evidence that the said Jesse W. Jones was of sound and disposing mind and memory at the time he made said writing; and the fact that there is an unexecuted attestation clause at the foot of said writing No. 1 is not sufficient to invalidate the paper as a will, if its body and signature are in the handwriting of the said Jesse W. Jones." The court, in lieu of the foregoing instruction asked for by the plaintiff, gave the following: "The court instructs the jury (1) that although they may believe, from the evidence, that paper No. 1 is wholly in the handwriting of Jesse W. Jones, and signed by him, yet, having an attestation clause thereto annexed, but without witnesses, the law from this fact creates a presumption against its being a will; which presumption is, however, slight, but yet must be rebutted by some extrinsic evidence, before it can be held to be a will."

Our statute (section 4, c. 118, Code Va. 1873) provides as to the execution of wills as follows: *No will shall be*

valid unless it be in writing and signed by the testator, or by some other person in his presence, or by his direction, in such manner as to make it manifest that *the name is intended as a signature*; and, moreover, *unless it be wholly written by the testator*, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." It thus appears that by our law a will wholly written by the testator, and signed by him in such manner as to make it manifest that the name is intended as a signature, is complete without attestation. Without the attestation clause, signed by witnesses, or unsigned by them, the will is valid and complete.

We are therefore not to consider the question whether a presumption is raised by an unsigned attestation clause against an imperfect and otherwise incomplete will; that is not the question which arises in this case. There is no instrument otherwise incomplete which is to be affected by this unattested clause. The will must be conceded to be as perfect and complete under our law before the attestation clause was written as after it was written, unless the unattested clause so affects it as to render it invalid in some degree. Starting from this point, we will consider, then, what effect did the said attestation clause, unsigned, have upon this complete will.

It must be conceded that the signature to this will is so written as "to make it manifest that it is intended as a signature." It could obviously have been intended for nothing else. It is the testator's signature, and it is recognized as such in the body of the paper in due form. The statute, then, having been complied with in all respects, and the will complete, what presumption arises—what effect is produced on this complete instrument by the addition of the clause in question? The presumption is, and the probable intention of the testator was, to have the will attested when this clause was written. If he had done so, he would have

added nothing to what was already complete. Not having done so, is the will invalidated by this failure to carry out this unnecessary intention?

The testator must have intended one of these things—either to have carried out his first purpose, and failed by intention or accident; to have changed his intention upon becoming aware that his first purpose was unnecessary; or to have held the purpose unexecuted in his mind. Before it was done or after it was done, the will was complete. It was an act immaterial in itself to effectuate or destroy the will. Suppose we concede, for the sake of the argument, that he put the unexecuted clause on the paper with the distinct purpose of revoking it, would his action have had that effect, even if he had so intended? Our statute again provides on this point in the eighth section of the same chapter as follows: “No will or codicil, or any part thereof, shall be revoked, unless under the preceding section [seventh section, which provides for revocation by marriage], or by a subsequent will or codicil; or by some writing *declaring* an intention to revoke the same; and executed in the same manner in which a will is required to be executed; or by the testator, or some person in his presence and by his direction, cutting, tearing burning, obliterating, canceling, or destroying the same, or the signature thereto, with the intent to revoke.” The statute must be complied with as completely in order to revoke a will as it must be in order to make a valid will. At an early day in our history the legislature ingrafted upon the English statute of wills a provision which dispensed with subscribing witnesses in cases of wills wholly in the handwriting of the testator, as the statute either in England or this State did not provide where the will should be signed whether at the bottom or top, or elsewhere. It was held in some cases that a signing anywhere in the will was sufficient. Under the English statute (29 Car. II.) of course such a will had to be attested by witnesses, whether wholly written by the testator or not, as the statute required that it should be in writing, signed by him or by his direction, and that it should

be attested and subscribed by three or more credible witnesses in his presence; and this view was acquiesced in in England until the statute of 1 Viet., which required that wills should be signed at the end thereof. In this State, as we have seen, no witnesses were required to a will wholly written by the testator; and although our courts showed a disposition at one time to follow the English view as to the sufficiency of a signature anywhere on the paper (*Bailey v. Teackle*, Wythe, 173; *Selden v. Coalter*, 2 Va. Cas., 553), the publication required in England in such cases being absent under our law, the view was questioned and finally denied, as the proof of finality of intention might be altogether wanting in an unsigned and unattested will, recited in the case of *Waller v. Waller* (1 Gratt., 454). Such a will coming under consideration, it was held in this court that a will *unsigned* and *unattested*, was lacking in evidence of finality of intention, and the will in such guise was rejected. The legislature thereupon amended our statute so as to bring it plainly in accord with this decision, and it was required that the will should be signed in such manner as to make it manifest that the name was intended as a signature. Judge Allen said in *Waller v. Waller* (*supra*): "But in olograph wills signing does accomplish *another* and *most important* object. It *furnishes the proof*, and *generally the only proof* of which the fact is susceptible, that the act is a complete concluded act. Where an instrument is produced, proved to be in the handwriting of the deceased, showing upon its face that *it was a concluded instrument*, with his name subscribed at the end thereof, the sanity and freedom of the testator being proved, is not the proof complete? Does it not close the door upon any parol proof as to any change of testamentary intent as fully and effectually as the proof of the due execution, publication, and attestation of an attested will does?" This case was decided in 1845, and the law of this State at that time required wills of personalty to be executed and attested in the same manner as wills of real estate (Act February 20, 1840; Acts 1839-40, c. 57, § 2), which by the act of March 4, 1835 (chapter 60, § 1, p. 43,

Acts 1834-5), unless wholly written by the testator, were required to be attested by two or more credible witnesses in his presence; and it was provided by the same act that the will should be signed by the testator in case of an olograph will, and otherwise by some person in his presence and by his request.

At our revisal in 1849, the revisors recommended, as they say, in conformity to the decision in *Waller v. Waller* (*supra*), an amendment to the section, the words, "*in such manner as to make it manifest that the same is intended as a signature*," which in their opinion was thought better than an arbitrary rule requiring the signature at the end of the paper. (Report of Rev. p. 516, c. 122, § 4.) This section was adopted by the legislature as to this as recommended, though otherwise changed. (Code 1849, c. 122, § 4, p. 516.)

In the case of *Waller v. Waller*, Brooke, J., dissented, but four judges rejected the will. Only three assign their reasons, but these concur in rejecting the will because it did not manifest a finality of intention. Since the act of 1849 (*supra*), the case of *Ramsey v. Ramsey* (13 Gratt. 664) was decided in this court (in 1857). In that case, which was concerning an olograph will, the only question raised and decided was as to the sufficiency of the signing where the name of the testator appeared in the beginning only, as, "I, Thomas Ramsey, of C., do make this, my last will and testament," etc. The court held that the signing at the top alone was an equivocal act, and the will was rejected because the *requirements of the statute* were not complied with, and the will was not signed in such a manner as to make it manifest that the name was intended as a signature.

In Jarman on Wills, as to execution of wills (volume 1, p. 77), in the first note, it is said: "It should be observed at the outset that though a will be not properly executed as a will, with subscribing witnesses, it may still be good as a olograph, when that kind of will is allowed, if it answers the requirements of the statutes as to olographs, though it contain more than the statute requires;" that something more than the statute requires, doubtless referring to an

unexecuted attestation clause, as the case of *Brown v. Beaver* (3 Jones [N. C.], 516), is cited. In that case the attestation clause was signed by only one *competent* witness, one being rejected as incompetent. The will was then proved as an olograph will, and the will was sustained, the court saying: "Going beyond the requisition in respect to proofs cannot *annul that which* comes up to them."

The cited case of *Harrison v. Burgess* is to the same effect. (1 Hawks, 384.) The will, having a defective attestation, was nevertheless proved and sustained as an olograph will.

The case of *Hill v. Bell*, decided in the supreme court of North Carolina in 1867 (Phil. [N. C.] 122), was the case of an olograph will which had appended to it an attestation clause which was *unsigned by witnesses, as in this case*. The first objection urged against the will was that it contained an unsigned attestation clause, and it was claimed that the testator intended to make and publish it as an attested, and not as an olograph will, and therefore it was never so completed as to operate as a will. This objection was overruled upon the authority of *Harrison v. Burgess* and *Brown v. Beaver* (*supra*). The court said: "The declaration made by the decedent in the present case, that he wished to obtain the subscription of witnesses to his will, though strengthened by an attestation clause, cannot be of more avail against its validity than was the actual attestation in the cases referred to."

By the statute in that State an olograph will is required to be in the handwriting of such deceased person, with his name subscribed thereto, or inserted in some part of such will, and the will shall be proved by three credible witnesses to be entirely in his handwriting (Rev. Code N. C. ch. 119, § 1, p. 606), and when these and other requisites of the statute, as to deposit, etc., have been complied with, such wills have been sustained, notwithstanding the design may have existed in the testator's mind to go further and have it witnessed, and this upon the ground that all had

been done which the statute required to be done, and that more could not lawfully be required.

In the case of *Devecmon v. Devecmon* (43 Md. 335), decided in the Court of Appeals of Maryland in 1875, the will contained an unsigned attestation clause, and purported to devise both *real* and personal estate. The incompleteness of the will, in that the attestation clause was not signed, was held to raise a presumption against it, and that this presumption was strengthened because the instrument purported to dispose of real estate as well as personal property. Although wholly in the handwriting of the deceased, it was incomplete to dispose of real estate, without witnesses, under the law of that State. (Code Md. art. 93, § 301.) This will was, therefore, upon its face incomplete, and therefore the finality of intention not appearing upon the will it was necessary to prove it, which was done, and the will admitted as a will of personal estate. It was void as a will to pass real estate, as we have seen.

In the case of *Plater v. Groome* (3 Md. 134), the court said: "When a paper is unfinished, the presumption of law is strong against it; and if there be added to the paper the attestation clause, and the names of the witnesses be omitted, and the signature of the testator be wanting, and the *blanks* remain unfilled, *these circumstances* will raise a presumption that the deceased had either abandoned his intention of executing the instrument or that he never fully made up his mind on the subject." These cases, and all similar cases, are widely different from this case, and are readily distinguished. They are cases where something essential remained to be done. In a case where a will purports to devise *real* and *personal estate*, and the will is incomplete, imperfect, so as to devise *both*, the fact that all has been done which is necessary to pass one species of property does not disturb the presumption against the finality of the intention. It is, nevertheless, an incomplete instrument. The finality of intention applies to the *will*, not to any particular species of property devised. The intention not

appearing in such case upon the face of the will, the paper is insufficient, standing alone.

But if the question to be determined is as to the finality of intention, what presumption of this sort could a court discover when the whole will, standing alone, and considered *as a whole*, indicated and exhibited a complete achievement of every purpose manifested therein; and so the same court which decided the case of *Devecmon v. Devecmon* had already rendered a decision sustaining a will, with an unattested attestation clause, the intention of the testator being complete, so far as the will manifested any intention, without the attestation clause either signed or unsigned by witnesses (*Brown v. Tilden*, 5 Har. & J. 371), this being a case of personal estate only; while in the case of *Barnes v. Syester* (14 Md. 509), which was signed and sealed with an attestation clause unsigned, this being a will of real estate as well as personal estate, the will was rejected. Without witnesses, the will was ineffectual to operate, as to the whole design of the testatrix, as evinced in the will, and a presumption was held to arise as to the finality of intention as to any part. It was not, and is not reasonable to presume that a testator's purpose is less definite as to the disposition of one species of property disposed of therein than as to any other. The question is not in any case whether the will is sufficiently executed to dispose of something mentioned therein, but whether it is, *as a will*, executed in accordance with the requirements of the law; and as to this State the requirements of the law are the same as to both species of property mentioned, and, "when the formalities are present which the law requires, parol testimony cannot be heard against the will."

The learned counsel for the appellees cites numerous authorities to support the decision of the circuit court in this case. Of them, so far as they have not already been considered, we will say that they do not apply to this will. Judge Tucker is referred to as saying: "In like manner, the completion of the declaration of the testator's intentions must sufficiently appear, or the instrument sought to

be established will not be sustained ;” and after speaking of the presumption raised by an unattested attestation clause, and other circumstances, he says : “ And of all this the reasons are obvious, since as long as the testator leaves incompleting what he contemplates to complete by a further act, he himself cannot look upon the act as final. If, with power to complete it, he fails to do so, we have the most irresistible evidence that his mind had not finally decided.” If these views of this learned author (so justly extolled by counsel) are read as of the time he wrote, we will observe that he bases his remark on the question of finality of intention in the execution of the paper ; and the provision of the statute of 1849 was not then a part of our law. Now, if the will be so signed as to make it manifest that the name is intended as a signature, the act is complete, and we find the same author saying (ch. 19, book 2, p. 292): “ (2) But if the testamentary paper be not *subscribed* by the testator, and on the face of it there appears an intention to make some other devise, or to do some other act which is not done, it will be considered as wanting that character of *finality*, and that *conclusiveness of intention*, which are requisite to make a will, and it ought not to be admitted to probate as such.” The case of *Beatty v. Beatty* (1 Add. 60), is much relied on by the appellees, and the first instruction given by the circuit court was doubtless based upon this case ; for the court held that the will would have been clearly entitled to probate, but for the unsigned attestation clause, saying : “ But if a testamentary paper be imperfect, either in itself or in the writer’s apprehension of it, it can only be entitled to probate on proof being furnished of his having been prevented by the act of God from completing it ; and this presumption was held to be slight.” To a similar effect is *Doker v. Goff* (2 Add. 42), in which there is a *quere* whether a paper so circumstanced can in all cases be considered an *unfinished* paper, the word “ witnesses ” being so written as to leave no room for names of witnesses beneath, and the whole question was made to turn upon the idea of finality appearing upon the paper. *Waller v. Waller*

(1 Gratt. 454) was a case of real and personal property, and has been already sufficiently considered along with the Maryland case, *Devecmon v. Devecmon* (*supra*).

In all these, and such similar cases as we have examined, the ground was taken that the conclusion of finality was excluded when the paper appeared to be unfinished. When this was held as to wills like that in *Waller v. Waller* and *Devecmon v. Devecmon* (*supra*), the will was incomplete to effectuate the whole design contemplated by the testator, and a presumption arose. In cases like *Beaty v. Beaty* and *Brown v. Tilden* (*supra*), where personal property alone was concerned, the decisions are not uniform. In the first case the English court held the testamentary paper invalid. In the second, the Maryland court of appeals held the testamentary paper valid on its face, notwithstanding the want of signature, and the blank attestation clause; "the signature not being required by the law of that State to such a will." In neither England nor Maryland do the provisions of our statute obtain. In the absence of such provisions much is left to depend in all cases upon the appearance of the paper as to this question of finality. But when certain formal tests are provided by statute in the presence of these, what inference can arise as to finality of intention? As was said by this court in *Waller v. Waller* (*supra*): "When the formalities are present, parol testimony cannot be heard against the will, for that would be to hear parol testimony against the statute." "And, on the other hand, would any degree of proof short of the formalities prescribed," etc., "suffice, though aided by the strongest proof of testamentary intent?" "When the formalities are absent, parol testimony cannot avail to supply their place." Our statute having prescribed the formalities required, where these exist no further proof can be required; and when a testator has complied with all the law's prescription, and preserved his will in that guise, no endorsements thereon short of the requisites provided for revocation can affect the testamentary character of the paper. If any essential thing remains to be done to complete the entire *will*, if a signature is neces-

sary, and one is wanting, or if witnesses are *necessary* to subscribe the attestation clause, and they are wanting, then the failure to complete the will is not explained by the instrument; but where everything has been done which the law requires, everything is complete upon the face of the will, and no presumptions arise from the failure to do a wholly vain and unnecessary thing. The will in this case is complete in all respects, and, the soundness and sanity of the testator being established, the judge of the circuit court should have given the first instruction asked by the plaintiff or propounder of the will; and, if he had done so, the controversy would have ended there. All that we have said applies with equal force to the codicil; that also comes up to the requirements of the law in all respects, and the question of how far it affects or modifies the will becomes a question of construction, and is not one of probate.

The codicil is such a paper, under the proofs, in this case stated above, as must be admitted to probate. Its testamentary character is unquestionable. It is dated the same day the will is, and is on different colored paper; but it cannot be from this determined that it was written before the will. It is evidently intended as a codicil, and was so preserved with the will.

We think the circuit court of Albemarle erred in rejecting the first instruction of the plaintiff, and in giving the first instruction given by the court; and for that error its judgment appealed from here will be reversed and annulled, and the case remanded for a new trial, to be had therein in accordance with the foregoing views. This disposes of, and includes all the questions raised on the trial which remain of any importance in the case, and the remaining questions will not be reviewed in this court.

FAUNTLEROY, J., concurred in the opinion of LACY, J.

LEWIS, P., dissenting, said:

I dissent from the opinion of the court in this case. In

my judgment, the law was rightly propounded to the jury by the circuit court in relation to the effect of the unsigned attestation clause at the foot of the paper, designated in the record as paper No. 1. The argument for the appellants, which is sustained by the court, is, that the paper being wholly in the handwriting of the deceased, and complete as a will under our statute, without the attestation of witnesses, its validity as a will is not affected by the annexation of the attestation clause, because the addition of the clause was an act of supererogation.

This view, though at first blush plausible, is not sound. The real question, I take it, is not, merely whether the requirements of the statute have been fully complied with, but whether the deceased had done, everything that in *his apprehension* of the paper in question it was necessary to do, or that he *intended* to do, or to have done, before completing it as his will. And the presumption arising from the unsigned attestation clause is, that he did *not* regard it as a completed instrument, or as a final and concluded act. This is a well-settled rule relating to wills, if judicial decisions, almost without number, can settle anything. The law upon the subject is well stated by an eminent author as follows: "An attestation clause [annexed to a will] without witnesses makes the paper *an unfinished instrument*, even where it is signed by the testator, and the presumption of law is *against* such papers, even where the attestation by witnesses is *not indispensable*, and when offered for probate it must be rebutted." (Redfield, Wills, 213, note 29. See, also, 1 Wms. Ex'ors, marg. p. 84; 1 Jarman, Wills, 244; 1 Tuck. Comm. 385-6.)

In *Beatty v. Beatty* (1 Adams' Reports, 154), a case often cited, and which, I think, is not only applicable to, but is conclusive of, the question before us, Sir John Nickoll, in delivering judgment, said: "The paper propounded would be clearly entitled to probate but for the attestation clause. It is all in the deceased's handwriting; it is signed and dated; it appoints an executrix; it is a complete disposition of personal property, and the deceased had no real

estate to suggest to him the necessity of executing his will in the presence of witnesses. But if a testamentary paper be imperfect, either in itself or in the writer's apprehension of it, it can only be entitled to probate on proof being furnished of his having been prevented by what is technically called the 'act of God' from completing it. As, therefore, the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, *in his apprehension of it*, till that operation was performed, the presumption of law is against a testamentary paper with an attestation clause not subscribed by witnesses," though the presumption, he added (as the circuit court in the present case instructed the jury), was only a slight one. And in a note to the case, it is said that this was the doctrine of the English courts of probate from an early period, until the decision in *Cobbold v. Baas* in 1781, which was speedily overruled.

The English cases to the same effect are numerous. Many of them are cited by the text-writers on the subject, and need not be particularly referred to here. Nor have I been able to find, after diligent search, any case decided in England, before our revolution, in which the contrary has been held. It was asserted in the argument at the bar, that there were such decisions, *but not one was cited*, nor are any cited by the court in *Watts v. Public Adm'r* (4 Wend. 168)—a case much relied on by the appellants—though the chief justice who delivered the opinion seemed to think there were such cases. The learned and elaborate opinion of Chancellor Walworth, from whose decision the appeal in that case was taken, and which is reported in 1 Paige, 347, is, to my mind, conclusive upon the point. Besides, *the decision* of the case in 4th Wendell proceeded on the ground that the presumption against the paper propounded as a will was rebutted by the evidence.

Much reliance was also placed in the argument upon the case of *Brown v. Tilden* (5 Harr. & J. 371). The facts of that case were peculiar, and of it it was said by the Court

of Appeals of Maryland in the subsequent case of *Plater v. Groome* (3 Md. 134), that the strong language used in the opinion must be taken as having exclusive reference to the particular facts of the case. And in *Plater v. Groome*, as well as in *Barnes v. Syester* (14 Md. 507), and in the recent case of *Devecmon v. Devecmon* (43 Md. 335), the principle decided in *Beatty v. Beatty* (*supra*), was fully recognized as a part of the law of Maryland.

I am of opinion that it is equally applicable here, as a part of the law of Virginia; for while the statute permits a holograph will to be made without the necessity for attestation by witnesses, it does *not prohibit* the making of an attested will, and, therefore, it seems to me the same presumption arises of a want of a *final testamentary intent* in respect to a paper like the one in question, as was held to arise in the case of *Beatty v. Beatty*. An attestation by witnesses was no more required by the English statute to make the paper propounded in that case a valid will of *personality*, than our statute requires a holograph will to be attested by witnesses, and yet it was held that the unsigned attestation clause in that case gave rise to a presumption against the paper as a will, which was not rebutted by the evidence adduced.

Indeed, it seems to me that this view has been substantially adopted by this court as a sound legal principle, in the case of *Waller v. Waller* (1 Gratt. 465), as that decision was explained in *Ramsey v. Ramsey* (13 Gratt. 664). In the first mentioned case, Judge Baldwin concurred in the opinion of Judge Allen, while Judge Stanard concurred in reversing the judgment, without concurring in Judge Allen's opinion, and Judge Brooke dissented. So that Judge Allen's opinion was *not* the opinion of the court. Cabell, P., gave an opinion of his own, in which he held that the paper propounded in that case could not be regarded as a final and concluded act, not alone because of the fact that it was not signed, but also because it was *not acknowledged* in the presence of witnesses. The paper was wholly in the handwriting of the deceased, and purported to dispose of the whole

of his estate, real and personal, and concluded thus: "In witness whereof, I have hereunto set my hand, this — day of —, 1841.

"Signed and acknowledged in the presence of —."

Judge Cabell said the paper bore evidence on its face that the decedent did not regard it as a final and concluded act; that he intended something further to be done, namely, that it should be signed *and acknowledged* to be his will in the *presence of witnesses*, and upon this ground he concurred in reversing the judgment of the lower court admitting the paper to record. And in *Ramsey v. Ramsey*, it was said by Judge Daniel, in whose opinion Judge Allen and the whole court concurred, that the decision in *Waller v. Waller* cannot be held as declaring any principle broader than that announced in the opinion of Judge Cabell, a principle, it seems to me, in harmony not only with the ruling of the circuit court in the present case, and with the decision in *Beatty v. Beatty* and a long line of like decisions, but with common sense as well.

It seems somehow, to be supposed, moreover, that a question of revocation arises in the case, and much has been said upon that point. To my mind all this is irrelevant. The question here is not whether a will has been revoked, but *whether a will has been made*; and I will only add in this connection, that the presumption above mentioned in respect to the paper in question, instead of being rebutted, is strengthened by the evidence in the case.

As to the paper designated as No. 2 I will say only a few words. It was executed on the same day with paper No. 1, and is as follows: "I do not charge any of my children with anything I may have given them before my death. The \$1,000 for my daughter, Mary, is to be paid to her, and then she is to have equal of the balance. (Signed) J. W. Jones, May 14th, 1862." I am satisfied from the record that this paper *preceded* the writing of paper No. 1, and was intended as a memorandum merely, though many years afterwards found in an out-house folded up with that paper. But be that as it may, it does not expressly refer to paper No. 1,

and there is nothing in the case, to warrant the conclusion that it refers to it at all; so that it cannot operate, in my opinion, as a codicil, republishing paper No. 1 as a will (1 Lom. Ex'ors, 62), and it is equally clear that, standing alone, it is not entitled to be probated as a will, because altogether too vague and indefinite. The case of *Gibson v. Gibson* (28 Gratt. 44) is an authority upon this point.

Many other important questions were discussed in the argument at the bar, but as the court has not found it necessary to pass upon them, I make no allusion to them. I think the opinion just delivered is contrary to the settled law, as it is laid down by all the text-writers, and as it has been expounded by the courts, and I respectfully, but most emphatically, dissent from its conclusions.

Judgment reversed.

See, also, *Newton v. Seaman's Friend Society*, 3 Am. Prob. Rep. 18, and the note (codicils and incorporation of other instruments); *Bradish v. McClellan*, 3 Id. 201; *Reagan v. Stanley*, Id. 251 (separate entries in a diary as an holographic will); *Estate of Rand*, Id. 460; *Byers v. Hoppe*, 4 Id. 218; *Likefield v. Likefield*, 5 Id. 478; *Beach on Wills*, §§ 8, 16, 60.

GORHAM vs. BETTS.

[86 Kentucky, 164.]

MEANING OF THE WORD SURVIVORS.

Where there is a devise to several persons, with a devise over to the "survivors" in the event of the death of one of the devisees, the word "survivors" will be given its natural and literal meaning, unless it appear from other provisions of the will that the testator used it as synonymous with "others."

APPEAL from a judgment of the Scott Circuit Court.
The opinion states the case.

Breckinridge & Shelby, for the appellants.

James E. Cantrill and *J. F. Askew*, for the appellees.

HOLT, J. James Betts died testate in 1856. His will provides *inter alia* as follows:—

Fourth. I direct that, after the death of my wife, the remainder of my estate, all debts being first paid, shall be divided among my children, James, Sampson, Sarah, Mary and Charlotte, so as to make them equal, taking into account what each one may have received of me by way of advancements or charged in my estate book, which advancements are to be deducted from the shares of my children respectively; but it is my desire that my three daughters shall have a home where I now reside, and I therefore direct that, in the division of my land, the shares of my said daughters shall be laid off together, so as to include the dwelling-house, garden, spring-lot, and the ground near the dwelling-house, in such form as will be convenient for them as it can be made without injury to the other shares. . . .

"Fifth. It is my will that my children shall have the full title in fee-simple to the property I devise them, with the following restrictions; First, during the lifetime of my daughter Mary's husband, Wm. W. Brown, all her property shall be held and managed by my son James, in trust for her use and benefit, and for the use and benefit of her daughter Ophelia, in case of Mary's death, while her said husband is living; and secondly, *in case either of my daughters above named should die leaving no child living at her death, then her portion shall be equally divided between her sisters only, my sons taking no part thereof.*"

These are the only portions of it that bear upon the question now presented.

After the death of the testator's widow, and in 1867, the daughter Charlotte died childless.

In 1877 the daughter Mary died, leaving an only child, the appellant, Ophelia Gorham. Up to this time there had been no division of the estate; but it was had after Mary's

death, and there was allotted to Ophelia her mother's share and one-half the portion of Charlotte; and to Sarah, the only surviving sister, her original share and one-half of that of Charlotte, the land so allotted to her being the seventeen acres now in dispute, and the right to which depends upon the construction of the above clauses of the will. She died childless in 1885, leaving a will by which she attempted to devise to and for the benefit of the appellees the land thus obtained. The child of Mary now denies her right to do so, and claims that she, as the representative of her mother, is entitled to the property by virtue of the will of James Betts, her aunt having died childless. The half of Charlotte's portion, which Sarah acquired by survivorship, vested in her in fee. She therefore had the power to devise it. In cases of this character, it is a general rule that accruing shares vest absolutely.

Mr. Jarman says: "Where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares that if one of them die before twenty-one or marriage, it shall survive to the others, if one dies and three are living, the share of that one so dying will survive to the other three; but if a second dies nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." (2 Jarman on Wills, 620.)

True, this rule will give way to a positive indication of a contrary intention in the testator, but it must clearly appear. Indeed, Mr. Redfield says: "It seems to have been early adopted as a rule of construction in regard to shares which had once vested by survivorship that they should not so vest again, unless by force of express words to that effect." (2 Redfield on Wills, 373.)

The rule will only yield to the intention where it is manifest from his will that the testator intended the entire property to pass in a mass to the ultimate object of his bounty, and that an accruing share should be carried over with an original one to such object. No such manifest intention

appears here. There is nothing in the will compelling such an implication.

The right to Sarah's original share remains to be determined.

The counsel for the appellants urge with commendable zeal and ingenuity that, upon her death without children, it, under her father's will, passed to the appellant, Ophelia Gorham; or if not, that it certainly lapsed to his estate, and, therefore, the lower court, in any event, should not have dismissed the appellant's petition, as Ophelia, in right of her mother, has an interest in it.

The devise over in this instance is not in terms to the "survivor," as in most of the reported cases, but to the sisters, and "sisters only."

There has been much discussion as to the effect of provisions in wills in favor of "survivors." The controversy has been whether the word should have its literal and natural meaning, or whether it should *prima facie* be construed as equivalent to the word "others" in the absence of circumstances or something in the context showing that it was used in a strictly literal sense.

There is a line of older cases, as in *Wilmot v. Wilmot* (8 Vesey, Jr. 10) holding to the latter view. Some eminent judges have also held that the words were convertible terms; but where the word "survivor" has been given the force of "other," thus letting in the issue of a deceased member of a class by inheritance from the parent, it has been usually done, as was the case in *Harris, &c. v. Berry, &c.* (7 Bush, 114), to avoid some consequence which it was quite certain the testator did not intend. It was necessary in order to effect an intention appearing upon the entire will. The later cases, however, hold that the word "survivor," when unexplained by the context, is to be given its natural meaning, and interpreted according to its literal import. As this rule may often defeat the unexpressed intention of the testator, courts readily listen to any argument drawn from the context or other provisions of the will, showing that "survivor" was used by him as synonymous

with "other;" but unless this appear, it may now be regarded as the settled rule that its literal meaning is to be given to it. (*Best v. Conn, &c.*, 10 Bush, 36; *Bayless, &c. v. Prescott, &c.*, 79 Ky. 252.)

Here, however, in the event of one of the class dying childless, her portion is to go to her "sisters only, my sons taking no part thereof." This language is plain and unambiguous. The intention is not left to conjecture. It cannot be reached by departing from the plain meaning of the words used, because there is nothing upon which to base such a departure. His language is to be construed and not changed. As the intention is to be regarded, if it be apparent from the entire language of the will, then it must be so construed. In this will, however, there is nothing, either expressly or impliedly said, as to the children of the devisees taking, and Ophelia was then in being, and in fact named in it. If Charlotte had survived Mary, and then died childless, Ophelia would not have been entitled to any of her portion, because under the plain language of the will it would have passed to the surviving sister, Sarah.

The devise to the daughters was in fee upon condition. A defeasible fee was created, but only so long as there was a survivor of the class named. The devise over was to a surviving *sister*. When but one remained alive there could be no defeasance, although she might die childless. The devise over was no longer effective. The defeasible character of the fee ended when but one sister remained alive. The defeasance could no longer prevail. The testator declared that if one of the three sisters died childless, her portion should go to "her *sisters* only, my sons taking no part thereof." It is but a question of intention; and the testator knew that, under the plain language used by him, the right to the property was limited to the sisters, and that its defeasible character must necessarily end when but one of them remained alive. He must, therefore, have intended that the fee-simple should then vest in her. This being so, she had the power to dispose of it by will, and there

was no lapse of the devise as to even her original share, although she died childless.

Judgment affirmed.

Construction of the Word "Survivors."—In *Wilmot v. Wilmot* (1802), 8 Ves. Jr. 10, cited in the principal case, there were bequests to three children in thirds respectively; with a direction, that they should not be put in possession till their respective attainment of particular ages; and in case of the death of either of the above-named children before the ages mentioned, that third to be equally divided between the two surviving children; and in the event of the death of two before the respective ages above mentioned, then the whole to devolve to the surviving child; but should all his children die before they should attain their said respective ages, then the whole of his estate was given over. One died having attained the age mentioned. Afterwards another died under that age. The administrator of the legatee who died after attaining the specified age, claimed a moiety of the remaining fund, upon the ground that she lived to the period at which it was clear upon the whole will that the testator intended all the interests to be considered vested. This view of the case the Lord Chancellor [Eldon] sustained, saying, "It must be argued, that the word 'surviving' means the same as 'other,' or 'living at the age aforesaid.' In the clause in which the gift over is made, it was never meant that any portion should be taken. There is a number of authorities for construing the word 'surviving' to mean 'other.' I think they are right in contending that this vested."

In *Harris v. Berry* (1870), 7 Bush. 118, cited in the principal case, the testator provided, "Should any of my children die before they attain lawful age or without lawful issue, the portion of my estate bequeathed to them to be equally divided between the survivors." One of those children died childless, and another, leaving issue, before the death of the testator, and between that time and the death of his son, Younger Berry, eight others of the testamentary children died leaving children. The devisee Younger Berry died adult and childless. Judge Robertson, delivering the opinion of the court, said: "We do not doubt that the death of Younger Berry was the proper time for determining what 'survivors' are entitled to the estate devised to him in fee, defeasible on the condition of his death without issue, and on that question we concur with the Circuit Court. . . . 'Survivors,' as written, is a flexible term, not necessarily meaning the testator's surviving children only; but, when moulded by the context and spirit of the will, may consistently with the literal import comprehend all his surviving descendants who were intended to be beneficiaries. Such was evidently the opinion of this court, as clearly intimated on an analogous question in the case of *Birney v. Richardson, &c.*,

5 Dana, 429. In that case after some reasoning, and referring to Roper on Legacies (Vol. 1, p. 426), and Lord Eldon's opinion in Wilmot v. Wilmot, 8 Vesey, this court added: 'And according to that and several other analogous cases, it would seem that when a bequest is made to the survivors of any one of several children dying without issue, the testator should be understood as meaning by survivors his other children, unless they also had died without issue, because his presumed object was that all who should have issue, should be entitled to an equal interest, and that nothing but death without issue should disturb that equality.' "

"While there is learning displayed in the *dicta* of the latter opinion (Birney v. Richardson, 5 Dana, 424), in agreeing with Lord Eldon's view, who construed the word 'survivors' as synonymous with 'others' in Wilmot v. Wilmot, 8 Ves. Jr. 12, yet it is there expressly decided that the rule was based alone upon a presumption which opposed the literality of the will, whose context, it was held by various authorities in note 3 to Wilson v. Awdry, 5 Ves. 465; and Perry v. Woods, 3 Ves. 204, may exclude that construction, which seems to have been adopted more to supply wills with words on account of supposed defects of expression than to construe the language they actually contain." Bayless v. Prescott (1881), 79 Ky. 252, 256, wherein Hargis, J., in an able opinion reviewing the authorities in point, at page 254, said:—"To hold that the words, 'such of my devisees as shall survive the said Phœbe,' are equivalent to the testator saying that he gave the land to his other devisees or their survivors, would not be construing but altering the language of the will, which is unambiguous, and so plain that there is hardly room for construction."

In Best v. Conn, etc. (1878), 10 Bush. 36, 38, the court said:—"The language of the testator is plain and unambiguous, giving to the persons named a life-estate in the tract of land set apart to each, or to them respectively; and if the life-tenants at the time of their deaths left issue, such issue would take their respective parts in fee-simple under the will. But he expressly declares that if either of the aforesaid legatees (or, it may be added, *beneficiaries*) die without issue, in that event his or their portion is to go to their survivors equally. If the event provided for should happen—that is, if either of said devisees should die without issue, and the part of testator's land devised to him for life should go to others than the surviving devisees, if there were any to answer that description,—both the intention of the testator and the language of the will would be violated." It was concluded, therefore, that the children of a deceased devisee were excluded from any interest in the land left to another devisee dying subsequently without issue, and that the latter's portion of the property should go to the surviving devisees. So, also, in Smith v. Osborne (1857), 6 H. L. Cas. 375, 399, it was declared that the word "survivor" should be read "other."

In the case of *Ranelagh v. Ranelagh*, 2 Mylne & Keen, 441, the language of the limitation was this:—"In case of the demise of any of the above parties (meaning the first devisees), without legitimate issue, their, his, or her proportions to be divided among the *survivors*." And Lord Brougham said, in substance, that the word "survivors" was used in its plain and obvious sense, as meaning such of the individuals named as should be living when any of them happened to die. Such was the construction in *Cromek v. Lumb*, 3 Younge & Collyer's Exch. 566.

In *Davidson v. Dallas*, 14 Ves. Jr. 577, the testator had by his will bequeathed to the children of his brother Robert £3,000, to be equally divided among them with this limitation annexed: "And if either of them should die before the age of twenty-one years, their share to go to the survivors." After the testator's death two children were born to his brother Robert, and it was held that these after-born children were not included by a proper construction of the word "survivors," and that those children only who were living at the death of the testator were entitled. A different view having been adopted, it was declared by Lord Eldon to be a forced construction of the term "survivors."

The will construed in the case of *Crowder v. Stone*, 3 Russ. 317, contained a clause similar to those in the foregoing cases, and in construing it Lord Lyndhurst held that the survivor was entitled to the whole. In speaking of the construction which appellee's counsel contend for, he said the court may sometimes be compelled to adopt it in order to accomplish the intention which appears on the whole of the will.

In the case of *Ferguson v. Dunbar*, 3 Bro. C. C. 468, Lord Thurlow said, he thought the testator meant that the children should take the share which would have accrued to the parent if living; but not having said so, and having limited such share to the survivors or survivor, he must declare G., as the only surviving child, to be entitled to the whole of E.'s share.

See further as to bequests to "survivors," *Beach on Wills*, § 297. *Cf.* *Dawson v. Killett*, 1 Bro. C. C. (Am. ed. 1844), 119, 124, notes; *Roebuck v. Dean*, 4 Bro. C. C. (Am. ed. 1844), 403; s. c. 2 Ves. Jr. 265; *Drayton v. Drayton*, 1 Desaus, 324; *Campbell v. Heron*, Cam. & N. 298.

See, also, *Outcalt v. Outcalt*, 5 Am. Prob. Rep. 272.

SALE *vs.* THORNBERRY.

[86 Kentucky, 266.]

DEVISE OF REALTY.—PRECATORY WORDS.—TRUSTS.

A testator devised real estate to his widow in fee-simple, adding these words:—
 "I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: That in the event she should marry again she will see that the interests of our children in said property are protected." *Held*, that the widow takes an absolute estate in the land, and does not hold it in trust for herself and children. If the extent of the interest of the children had been fixed by the provisions of the will, a trust might arise for their benefit.

APPEAL from a judgment of the Louisville Chancery Court. The facts are sufficiently declared in the opinion.

James S. Pirtle, for the appellant.

G. A. Winston, for the appellee.

PRYOR, C. J. John J. Thornberry, of the city of Louisville, departed this life some years since, leaving a last will and testament, and his widow and two children surviving him. After making certain specific devises to his children, he devised all the balance of his estate to his wife in the following manner:

"All the rest and residue of my estate, both real, personal and mixed, I give and bequeath unto my beloved wife Lutie Thornberry, in her own right *in fee-simple*. I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: That in the event she should marry again she will see that the interests of our children in said property are protected."

The devisor at the time of his death was somewhat involved in debt, and left nothing but real estate, the income of which was not sufficient to maintain his wife and children. The appellee, Mrs. Thornberry, still remains his

widow, and the two children are now living and parties to this appeal. After the death of her husband, the widow, with a view of economizing her means and to provide for her children, sold some of the real estate that she might invest the proceeds in other property more suitable to her condition and pecuniary necessities. The testator owned some land in Jefferson county, the subject of this controversy, that his widow sold by title bond to the appellant, Clarence Sale, who declined to comply with his contract on the ground that, by the terms of the will of the testator, the testator's two infant children have an interest in the realty sold him by the widow.

The question is raised by counsel for the appellant (the purchaser), that by the sixth clause of the will already set forth, the wife does not take a fee-simple estate in the land, but holds it in trust for herself and children.

If the request made of the wife in this case is to be regarded as a command, there would be but little doubt left as to the intention of the testator; or if the extent of the interest of the children had been fixed by the provisions of the will, a trust might arise for their benefit. If the testator had said: In the event of your marriage I request that you convey to our children two-thirds of the estate, the chancellor, looking to the entire contents of the will, would necessarily adjudge that the plain intention of the testator was to vest his children with an interest upon the marriage of his widow. The testator was a lawyer, and in such a pecuniary condition at his death as required some disposition to be made of his property, or a part of it, and a change from the then mode of living by his family to one less expensive. He knew the wants of his family, and in this condition, having the greatest confidence in his wife, and knowing her affection for their offspring, vested in her the fee-simple title, with the request simply that, as owner of the property, she would, if she ever married, look to the interests of the children. He knew not only the wants of his family, but the meaning to be attached to the words *fee-simple and in her own right*, and used this expressive lan-

guage so as to leave no doubt as to his intention, and that was to vest in his wife the absolute estate to the property devised by the sixth clause of his will.

While vesting in his wife the legal title does not of itself negative the fact that a trust was intended to be created, still the mere request by the testator that his wife should look to the interests of the children in the estate upon a certain contingency, will not defeat the plain purpose of the testator to vest in his wife the fee-simple title to his land. Such a title confers upon her the absolute property, and the purchaser was properly compelled to accept the conveyance.

The confidence of the husband in his wife seems not to have been misplaced—she has not disregarded the request of the husband, nor failed to provide for the welfare of the children in discharge of a duty imposed upon her by reason only of the relation of parent and children. The chancellor, if disposed to adjudge that a trust was created, would have much difficulty in determining its character and the extent of the holding by the mother and her children, and in its execution would necessarily speculate as to the intention of the testator in that regard. We have been referred to the case of *Bohon v. Barrett's Executor* (79 Ky. 378), as bearing upon this question, and as conclusive of the case being considered. There is a manifest distinction between the cases, and while the devise to Thomas L. Barrett was absolute, and the request made not as a condition upon which he was to take the estate, still it is plain, from the reading of the entire instrument, that Lillie Barrett was devised ten thousand dollars, to be paid her at the discretion of the trustee. In that case, although it was insisted that a devise was made absolute and unconditional, the testator in the first clause of the will directs the executor, who was claimed to be the sole devisee, to consult with A. J. Wood and Wm. J. Wood as to selling his real estate, and requires Lillie Barrett to remain with his brother, to be governed by his advice and counsel, not to marry without his consent, to render unto him the most implicit obedience, and

when this is done, he is requested to give her *ten thousand dollars* on such terms as he may think her interest requires; but this is left to his discretion, but not to be legally binding on him in a court of equity or elsewhere, but left to his sense of right and discretion: "*He being fully advised of my wishes concerning the said Lillie, and also concerning the said sum of ten thousand dollars.*" In that case the sum devised to Lillie Barrett, was fixed and definite, viz., ten thousand dollars, and the testator intending to give to her this sum of money also desired to place such restraints upon the young girl as would cause her to live with and be educated in the family of his brother, and while imposing such conditions as would conduce to show a mere request to his brother to give this sum at his discretion, he says in effect, you know why these restraints on the young girl, and the conditions as to the gift, are inserted in the will, by the use of the following language: *He (my brother) being fully advised of my wishes concerning the said Lillie, and also concerning the said sum of ten thousand dollars, which I request him to use for her benefit on the conditions aforesaid.*" On the performance of the conditions expressed in Barrett's will Lillie was to have this sum of money, and having complied fully with the wishes of the testator, there was no reason for withholding the devise.

In the present case no such trust arises, and the children must look alone, as the testator expresses it, "to the kind heart and good judgment" of an affectionate mother, in securing to them an interest in the property acquired by her under the will of their father.

Judgment affirmed.

See, also, *Colton v. Colton*, 11 *supra*, and the note and cross-references.

KINNEY vs. KINNEY.

[86 Kentucky, 610.]

CHARITABLE USES.—CY PRES.

A devise to a church "to be applied to foreign missions" is within the statute permitting devises to charitable uses.

APPEAL from a judgment of the Marshall Circuit Court.

Gilbert & Reed and *R. P. Quarles*, for the appellants.

W. W. Robertson and *Mr. Smith*, for the appellees.

HOLT, J. Benjamin Kinney died testate in 1886, being then the owner of one hundred acres of land.

His will provides: "I do will and bequeath to the Methodist Episcopal Church, South, to be applied to foreign missions, all of my property, real and personal, after the payment of my just debts, . . . for their use and benefit exclusively." He was never married, and his collateral kindred are his heirs-at-law. They now claim that the devise lapsed and became inoperative as to the land; and that they are, therefore, entitled to it. This claim is based upon the fact that our statute relating to charitable uses forbids a church from taking or holding the title to over fifty acres of land; and its construction is, therefore, involved.

The statute 43 Elizabeth, chapter 4 (1 M. & B., page 308), and which is emphatically known as the one relating to charitable uses, recognized and permitted the holding of estate without limit by and for certain charities therein named, among which were churches. It was *pro tanto* a repeal of the mortmain acts; and because of its general character this court held, that under the rule adopting as a part of our law all English statutes of a general nature enacted prior to 4th James I, it became a part of our law. It was held to be in force in this State in 1834, in the case of *Gass & Bonta v. White, &c.* (2 Dana, 170); and so re-

mained until the adoption of the Revised Statutes in 1852, as will appear by a reference to the cases of *Moore's Heirs v. Moore's Devises* (4 Dana, 354), and *Attorney General v. Wallace's Devises* (7 B. M. 611), both of which were decided prior to the last named date. By virtue of it, such devises in charity as were embraced by it were held valid in this State without regard to their extent. Actuated, doubtless, by a belief that public policy required a limit to this boundless right of acquisition by religious societies, the Revised Statutes, page 177, repealed this law, and by section 1 of chapter 14 provided that all devises for the benefit of certain charities therein named, among which are churches, should be valid, save as "hereinafter restricted;" and as a sort of mortmain act, section 3 of the same chapter provides: "No church or society of Christians shall be capable of taking or holding the title, legal or equitable, to exceeding fifty acres of ground; but may acquire and hold that quantity for the purpose of erecting thereon houses of public worship, public instruction, a parsonage, a grave yard and a horse pound."

The present General Statutes contain, in substance, the same provisions. (General Statutes, chapter 13.)

It is evident that the purpose of the statute was to prevent the accumulation in the hands of the churches of large landed estates. It was dictated by the same idea as to public policy which prompted the English mortmain act of 9th George II. Such a result would not only tend to cripple the progress and industry of the country without furthering the cause of Christianity, but would furnish a means and be likely to create a disposition upon the part of the church to meddle and interfere in matters of State.

Looking, then, to the purpose of the statutory restriction, it is evident that the devise now in question is not embraced by it, either in spirit or letter. It merely gives the property to the church in trust, to be applied by it to a charitable purpose. The restriction in the statute above cited was intended to prevent a church from taking or holding for *its own use* more than fifty acres of land.

This devise for charity is within the scope of our statute permitting such uses. Section 1 of chapter 13 of the General Statutes, which authorizes them, subject to the restriction already named, says: "All grants, conveyances, devises . . . of any lands . . . for the relief or benefit of aged or impotent and poor people, . . . churches, . . . or for *any other charitable or humane purpose*, shall be valid."

The objection that the devise is so vague that the intention of the testator can not be executed is not well taken. The trustee is named in the will, and the language used by the testator indicates definitely the purpose to which he desired his bounty to be applied.

So far have the English courts gone in favoring charities, that where it is evident a testator intends one by devise, but leaves the object to the selection of a trustee, who dies without making it, they will lay hold of it, and administer it under a *scheme*. (*Mills v. Farmer*, 1 Merivale, 55.)

Or if the specified objects cease to exist, they will remodel the charity; and it will not be allowed to fail, if it be apparent that charity was intended, although the particular mode pointed out may be impossible of execution. (2 Story's Equity, §§ 1170-1181.)

It is true that the doctrine of *cy pres*, as broadly administered by the English courts, has been rejected in this State; but if it were equally in force here, there would be no need of resort to it in this instance, because the donor has definitely fixed the purpose to which his charity is to be applied; and while this court has seen fit not to aid charities to the extent of making or changing a will, and has refused to go so far as to apply the testator's bounty to an object never contemplated by him, and to which he probably would not have contributed, yet because they are blessings in which all are more or less interested, they are looked upon with peculiar favor by our courts. They will not be allowed to fail for the want of a trustee; and if their object, as intended by the donor, be ascertainable and consistent with law and public policy, they will be upheld.

Judgment affirmed.

See, also, *Haines v. Allen*, 2 Am. Prob. Rep. 242; *Simpson v. Welcome*, Id. 248; *Hesketh v. Murphy*, 3 Id. 7; *Goodale v. Mooney*, 4 Id. 1; *Fairfield v. Lawson*, Id. 36; *Pritchard v. Thompson*, Id. 92; *Quinn v. Shields*, Id. 386; *Sowers v. Cyrenius*, Id. 541; *Webster v. Morris*, 5 Id. 158; *Beardsley v. Selectmen of Bridgeport*, Id. 298, and the note; *Chamberlain v. Taylor*, Id. 508; *Bristol v. Bristol*, Id. 332, and the note; *Tappan's Appeal*, Id. 198.

CHRISMAN vs. CHRISMAN.

(16 Oregon, 127.)

TESTAMENTARY CAPACITY.—INSANITY.—BURDEN OF PROOF.— POWER TO MAKE A WILL.

Testamentary capacity is essentially a question of fact to be determined after due consideration of all the evidence; and although, where there is a will duly executed, there is a legal presumption of sanity in favor of the testator, still where, in a civil proceeding touching the validity of the will, the question of sanity or insanity is directly in issue, the burden of proof is upon him who asserts the sanity of the testator.

APPEAL from a decree of the Circuit Court of Lane County.

J. E. Fenton, W. R. Willis, and Ramsey & Bingham, for the proponents.

L. & W. R. Bilyeu, for the contestants.

LORD, C. J. This is a proceeding brought for the purpose of having an order of the County Court, admitting the will of C. E. Chrisman to probate, vacated and annulled, and to declare it void and of no effect. The will was executed on the twenty-sixth day of November, 1884, and the testator died on the twenty-first day of June, 1885, and left

surviving him a wife and seven children. On the twenty-fourth day of June, 1885, the said will was duly admitted to probate in common form, and the executors thereof having duly qualified, entered upon the discharge of their duties in administering the estate. Subsequently, and on the eleventh day of November, 1885, the contestants filed their petition to the effect: (1) That the said will was not properly executed; (2) that at the time the same was executed the testator was of unsound mind; and (3) that the will was procured by undue influence. The answer, after denying these facts, alleged affirmatively that the will was executed with the formalities required by law; that the testator was of sound mind, and that the said will was his free and voluntary act and deed. This affirmative matter being denied, and the cause thus at issue, it was referred by the court to a referee to report the testimony. After taking the testimony the referee filed his report, and the County Court proceeded to try the issue, and on the fourth day of October, 1886, adjudged and decreed that the order made on the twenty-fourth day of June, 1885, admitting said will to probate, be vacated, and that the will be declared null and void. Upon appeal to the Circuit Court, the decree entered therein was reversed, and the said will admitted to probate as the last will and testament of the said decedent, and from this decree of the Circuit Court the present appeal is taken.

The record of this case is voluminous, and the work of reviewing and digesting the mass of testimony it contains has been difficult and onerous. Much of this, no doubt, could have been avoided by restricting the latitude of examination and confining the testimony of the numerous witnesses to the matter in issue. Although by the pleadings, as already outlined, there are three distinct questions suggested for determination, an examination of the record has disclosed, and in fact the argument here has confirmed, that the contest is waged mainly about only one question, namely, whether the testator was of sound mind at the time the will was executed. Our statute of descents

gives the property of a decedent to his heirs unless divested by a will, and our statute of wills provides that no one can dispose of his property by last will who is not of sound mind.

When a will is offered for probate, and the mental capacity of the testator to make it is denied and contested, there usually arises the preliminary question, upon whom rests the burden of proof. Upon this point there is much confusion and contrariety in judicial thought, nor is it free from difficulty. There is a general presumption, it is said, in favor of mental soundness, and that usually the burden of proof rests upon the party denying it, whether the question arises upon a will or contract, or upon a trial for crime. The presumption is based on the idea that sanity is the normal condition of the intellect, and that insanity is exceptional and abnormal, hence the general presumption in favor of sanity or mental soundness.

The contestants claim that the *onus probandi* is upon the proponents, not only to show that the will offered for probate was executed according to law, but that the testator was of sound mind when he executed it. As we are satisfied that the will was executed with the formalities required by law, the further consideration of that phase of the subject may be eliminated. The contention of the contestants assumes that an executor in offering a will for probate impliedly asserts that his testator is of sound mind or mentally competent to execute a valid will, and that while it concedes to him the benefit of the presumption of sanity, it does not relieve him of the burden of proving it when called into question, or thereby cast upon the opponents of the will the burden of affirmatively proving insanity. "When a will is shown to have been duly executed," said Prim, J., "the law presumes the competency of the testator." (*Greenwood v. Cline*, 7 Or. 26.) This is nothing more than saying that when a will is shown to have been duly executed, there arises a presumption in favor of the sanity of the testator, which at this stage of the proceeding, unless rebutted or

overcome by counter-evidence, will be sufficient to authorize the probate of the will.

As Mr. Schouler on Wills says: "When the will is shown to have been properly executed and witnessed, it may be fairly presumed that the testator was competent and unrestrained in the disposition of his property; but that these presumptions being of fact, or mixed law and fact, may be rebutted, and the proponent has nothing more than a *prima facie* case in his favor." (Schouler on Wills, § 174.) But in *Hubbard v. Hubbard* (7 Or. 44), it was said by the same judge, when the validity of the will as here is attacked by a direct proceeding, that, "in every such proceeding the *onus probandi* lies upon the party propounding the will, and he must prove every fact which is not waived or admitted by the pleadings, necessary to authorize its probate in the County Court. Whatever may be the form of the issue as to every essential and controverted fact, he holds the affirmative." In *Perkins v. Perkins* (39 N. H. 171), Bell C. J., after reviewing the authorities, said: "It is therefore proper to say that the burden of proving the sanity of the testator, and all the other requirements of the law to make a valid will, is upon the party who asserts its validity. This burden remains upon him until the close of the trial, though he need introduce no proof upon this point until something appears to the contrary." This doctrine that the burden of proving sanity when denied and contested rests upon the executor, or whoever sets up the particular will in controversy, was very ably asserted and maintained by Thomas, J., in *Crowninshield v. Crowninshield* (2 Gray, 524), and has been frequently approved and followed. (See, also, *Rigg v. Wilton*, 13 Ill. 15; 54 Am. Dec. 419; *Cilley v. Cilley*, 34 Me. 162; *Robinson v. Adams*, 62 Me. 369; 16 Am. Rep. 473; *Cramer v. Crumbaugh*, 3 Md. 491; *Morrison v. Smith*, 3 Bradf. 209; *Delafield v. Parish*, 25 N. Y. 32; *Baldwin v. Parker*, 99 Mass. 84; 96 Am. Dec. 697; *Comstock v. Hadlyme*, 8 Conn. 254; 20 Am. Dec. 100; *Evans v. Arnold*, 52 Ga. 169; *Beaubien v. Cicotte*, 8 Mich. 9; *Garvin v. Williams*, 44 Mo. 465; 100 Am. Dec. 314; *Williams v. Robinson*, 42 Vt. 658; 1 Am. Rep. 359;

Renn v. Samos, 33 Tex. 760; *Jenkins v. Tobin*, 31 Ark. 306; *McMechen v. McMechen*, 17 W. Va. 683; 41 Am. Rep. 683; *In the Matter of the Will of Convey*, 52 Iowa 197; Redfield on Wills, 28, 30; Schouler on Wills, §§ 169, 174; 6 Wait's Actions and Defenses, 383; Abbott's Trial Evidence, 113, 114.) Such, also, seems to be the English rule.

In *Barry v. Butlin* (1 Curt. Ecc. 637), Baron Park said: "The rule of law, according to which cases of this nature are to be decided, do not admit of any dispute so far as they are necessary to the determination of the present appeal, and that they have been acquiesced in on both sides. These rules are two; the first that the *onus probandi* lies in every case upon the party propounding the will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator." "Whether the party propounding a will," said Cresswell, J., "relies upon a *prima facie* case, or gives the whole of his proof in the first instance, the *onus* remains on him throughout." (*Sulton v. Saddler*, 36 Barb. 87; *Wallis v. Hodgeson*, 2 Atk. 56; *Ogle v. Cook*, 1 Ves. Sr. 177; *Jackson v. Hesketh*, 2 Stark. 518; *Fulton v. Andrew*, Law R. 7 H. L. 448; 12 Moak E. R. 76; *Hodges v. Holder*, 3 Camp. 366.) So that although numerous authorities may be cited *contra*, the rule deducible from these to which we have referred, while admitting the presumption of sanity to exist, when in a civil proceeding the question of sanity and insanity is directly in issue, fixes the burden of proving sanity throughout the entire trial upon the party who asserts it. And Mr. Schouler says in his excellent work already referred to, that "the larger and better class of American authorities point to the conclusion that the court or jury trying the case must, upon the whole evidence, be satisfied that the testator was of sound mind; so that if there be inevitable doubt left on this point from all the testimony, the will cannot be considered as proved." And adds that "this conforms to the English rule as stated." (Schouler on Wills, § 147, n. 5.) So that testamentary capacity is mainly a question of fact, to be determined from a consideration of all the

evidence in conformity to the principle as already stated. Before recurring specially to the evidence, there are some facts which lie on the surface of the record that need to be mentioned.

It appears that the testator with his wife and children emigrated from Missouri to Oregon in the year 1851, crossing the great plains with ox teams. After some changes of residence during the first years he finally settled in Lane County, of this State, where he accumulated a large estate, and died at an advanced age. The facts indicate that he was a man of but meager education, but possessed of a vigorous understanding, and much energy and decision of character. To these qualities he joined habits of great industry, strict economy and sobriety, and vigilant attention to his own affairs and business interests. As a result of such a combination of traits he early began to acquire property and to make money, which he prudently managed and safely invested, and thus continued to do and to accumulate without much abatement almost to the day of his death.

It is no doubt true that he "loved money," and was indefatigable in the pursuit of its acquisition, but his sound judgment and sense of right and justice made him an honest man. In all his dealings and conduct, so far as this record discloses, although always keenly alive to his own interests, and when menaced, ready to take the aggressive for their protection or security, there is no imputation of bad faith or trick or dishonesty. A man always of decided principles, his convictions were strong and not easily influenced, and being self-reliant and of a somewhat logical turn of mind, he rarely took counsel from others, but formed his own opinions, to which he adhered and from which he was seldom converted by the opinions of others. A character of this kind absorbed in business pursuits, and devoted for many years to the acquisition of wealth, dominated by a robust and energetic mind, but not devoid of the social affections and virtues which render domestic life attractive, could not fail to attract attention and become a commanding figure in the small community in which he resided. As

a consequence he was quite generally known throughout his county, and died one of its wealthiest citizens. In such case, any marked deviation in his habits of thought, or any aberration of mind indicative of incapacity to transact ordinary business, would have been readily noticed and remembered, and the decisive proof of it would have been easy and accessible. Now what is the nature of the facts, or the character of the evidence by which it is sought to be shown that the decedent was incapable of executing a valid will.

A short time prior to his death, and when he was nearly seventy-four years of age, the will in controversy was executed. It was written at the request of the decedent by Mr. Joel Ware, who had been acquainted with the testator for over a quarter of a century, and had been clerk of the Circuit Court for that county for nearly an equal period. Scarcely any one could have been selected under the circumstances more suitable to have written the will. His personal intelligence and high character, his long personal acquaintance with the testator, and his knowledge of legal matters as an officer of the court, are an assurance that he understood and appreciated the business he was called upon to perform, and comprehended his duty and what the law expected of him; and that if the testator had been of unsound mind, and surrounded by interesting and obtruding advisers, he would have noticed it, and doubtless have refused to write it, or at least suggested it be deferred to some other time. His testimony is clear, explicit, and unimpeached.

It is not possible to state it in detail, but in substance it goes to the effect that the will was dictated by the testator; that he understood the nature of the business, the property he had, upon whom he intended to bestow it, and the manner he meant to distribute it between them. Mr. Ware testifies that he had been intimately acquainted with and transacted business for the testator at intervals for twenty-seven years; that about the 22d of October, 1884, he received a letter from the testator asking him to come to Cottage Grove to rewrite his will (he had written a will for him some ten or

twelve years before), and that he, on the 26th of October, 1884, accordingly went and arrived at the house about three o'clock, and found the testator had gone to the post-office, whither he went and returned with him to his house. "When I got ready to write the will, Mr. Chrisman said to me: 'Now, Ware, I tell you what I want in that will, and I want you to put it into shape so that it will stick.' I wrote down as he told me until we came to the bequest to Chrisman F. Chrisman, when I suggested to him the allowance two hundred dollars per year appeared small, as it would only be about one fourth of the interest of the amount left him. He said, 'if you think so, hold on a minute.' He then got up, walked the floor, went out on the sidewalk, and after walking back and forward a few times he came in and told me to put it down; that it was sufficient to support him, and that every dollar he got over that would go. I then suggested that in case of sickness or disability it would not be sufficient. He said, 'that is so; I hadn't thought of it; fix it so that the trustees can give what in their judgment may be necessary in case of sickness or disability.' I made no further suggestion, *simply put in shape what he told me to put down*. After the will was written, I read it over to him section by section. He told me not to seal the will that night, and in the morning before I left he had me to read the will to him again, said he believed it was all right, but not to seal it as he wanted to read it by himself. That no one was present but Mr. Chrisman and myself, and Mrs. Chrisman was in and out of the room at times, and that Mr. Chrisman dictated the will, and the whole of it, and that he referred to no memoranda or paper while he was dictating it. That the old will I had before me, I think a will I wrote some twelve years before, and that the general drift of the two wills was the same, some small change in amounts, and a change in executors."

Upon the question as to his sanity at the time the will was written and before that time, and after, etc., he testified: "The question of his sanity or insanity never en-

tered my mind until after his will was probated. I saw no difference in him mentally from what I had known for twenty-seven years. I always considered Mr. Chrisman sane. In all his business transactions I never saw anything that to my mind would indicate insanity or mental weakness." After explaining about the former will, the correspondence which passed between him and the testator, and some deeds to certain property which he had written in answer to the inquiry as to his business capacity, he testified: "I never saw anything in his business habits to indicate any mental weakness. I always considered him a safe business man." Answering the inquiry as to his firmness, and the tenacity with which he contended for his own particular views on questions of business or otherwise, he said: "He was a man who did his own thinking. He would frequently *ask me how to do certain things, but he never asked me what things to do.* As to the disposition of his property, I inferred from his words and actions that he wished to dispose of his property in the manner he told me; the same as I set down in the will, and that he wished his property to descend to his blood relations." And again, "that he wanted to leave the children all well fixed and comfortable in this world's goods, and after that he wanted the balance of the property to go to those of the children whom he thought would be most likely to take care of it. I understood that to be his motive all through both wills. In my judgment, this is the key to the motive which prompted him to make the unequal distribution of his property by will, and which is undoubtedly the real ground of complaint against him."

It is not possible to review at any greater length the testimony of Mr. Ware, and we must content ourselves with saying that the examination of his evidence has satisfied us that the reasons which he assigned for the opinions expressed as to the sanity of the testator, and his capacity to transact business, are founded on facts and circumstances detailed from which no other rational or logical conclusion can be drawn, and that his long and intimate acquaintance

gave him the opportunity to observe any variation in his mental vigor, so that, if any existed, especially when he was called upon to write a will, which was to be the final disposition of the testator's property, he would not only have detected it, but his admitted intelligence and integrity of character are such that he would have esteemed it his duty to have made it known. Yet it never occurred to this witness, who knew he was enfeebled by age and disease, that there was any decay of his faculties or such mental incapacity as unfitted him to make a valid will. What constitutes testamentary capacity or "sound mind" within the meaning of the law has been repeatedly settled by this court. (*Heirs of Clark v. Ellis*, 9 Or. 128; *Hubbard v. Hubbard*, 7 Or. 42.) The testator must have "sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will." (*Converse v. Converse*, 21 Vt. 168; 52 Am. Dec. 58.) He "must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them." (*Delafield v. Parrish*, 25 N. Y. 9.)

"The phrase 'sound mind,'" said Sir James Hanner, "covers the whole subject, but emphasis is laid upon two particular functions of mind which must be sound in order to create capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty; above all, there must be understanding to comprehend their relations to himself, and their claims upon him." (*Broughton v. Knight*, Law R. 3 Pro. & D. 64; 6 Moak E. R. 350.) This probably is about as correct a definition of the law as any given, but it is merely a reiteration in a different phrase of what has been repeatedly expressed by other judges. The difficult question is to

determine what degree of mental capacity will entitle a person to make a will. The exposition of the law, as contained in the case of *Stevens v. Van Cleave* (4 Wash. C. C. 267, 268), was approved and adopted in *Clark v. Ellis* (9 Or. 128), by this court, and I find it frequently repeated and followed as a correct definition of testamentary capacity in other cases.

Mr. Justice Washington said: "He (the testator) must, in the language of the law, be possessed of a sound and disposing mind and memory. He must have memory. A man in whom this faculty is totally extinguished cannot be said to possess understanding in any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he has been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator as this, had he a disposing memory? was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, was his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will?" (*Harrison v. Rowan*, 3 Wash. C. C. 580; *Redfield Am. Cases on Wills*, 53; *Rice v. Rice*, 50 Mich. 448; *Free-man v. Easly*, 117 Ill. 317; *Will of Blakeley*, 48 Wis. 294; *Brinkman v. Rueggesick*, 71 Me. 553; *Brown v. Riffin*, 94 Ill.

560; Schouler on Wills, §§ 67-74; Redfield on Wills, pp. 120-135.) Other authorities might be cited, but these are sufficient to show the standard of capacity upon which the law insists to entitle a person to make a valid will. And it is noticeable, and needs to be emphasized, that in "deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of bodily health that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of." (*Harrison v. Rowan*, 3 Wash. C. C. 585; *Sloan v. Maxwell*, 2 Green Ch. 570; *Van Alst v. Hunter*, 5 Johns. Ch. 159; *Den v. Vanderve*, 2 South. 660; *Banks v. Goodfellow*, Law R. 5 Q. B. 562.)

That great age and bodily disease and afflictions may impair the mind or destroy its functions, rendering it unfit to transact ordinary business, is not disputed. But if such is the case, it must be shown, it cannot be assumed; for the law is well settled "that neither old age, sickness, nor extreme distress or debility of body incapacitate, provided the testator has possession of his mental faculties and understands the business in which he is engaged. The test is the integrity of the mind, not the body." (Redfield on Wills, 97, 102, 125.) It often happens that aged and infirm persons, who seem to have lost nearly all memory on different subjects, when their attention is once fixed upon their own property, business, or family, understand them well. (Taylor's Medical Jurisprudence, 336.) In such case, the only effect of extreme old age is to excite the diligence of the court to inquire more closely into his mental capacity.

As to the testator's physical health there is little divergence of opinion among the witnesses; all agree that it was feeble, and that his mind was not so alert and vigorous as formerly, and some think it was so impaired as to incapacitate him to transact ordinary business, although the reasons some of them assign for such opinion is not entitled to so much weight. To entitle a witness' opinion to much consideration, he must have knowledge of what testamentary

capacity means, "else," as Paxton, J., said, "no man's will would be safe." (*Eddy's Appeal*, 109 Pa. St. 406.) Although evidence prior and subsequent to the making of a will is admissible for the purpose of throwing all possible light on the subject, to enable the court to determine whether the will in controversy was executed by a sound mind, yet it is not to be forgotten that testamentary capacity or incapacity at the precise date of the transaction is the real point at issue. (*Schouler on Wills*, § 186.) Hence, great weight is attached to the testimony of subscribing witnesses; for they have the opportunity to observe the mental condition, and all the circumstances surrounding the execution of the will. (*Schouler on Wills*, § 179.) But the final decision of the case does not depend on them, but upon all the evidence adduced.

They may all deny the sanity of the testator, and yet if the proof of a sound condition of mind is shown by the whole evidence, the will must be upheld. (*Perkins v. Perkins*, 39 N. H. 169; *Thornton v. Thornton*, 39 Vt. 122.) Shortly after his will was drawn by Mr. Ware, the testator executed it in the presence of four witnesses who were his neighbors and friends, and whom he had invited to his house for that purpose. When they had assembled, he produced his will and said: "Gentlemen, this is my will, and I desire each one of you to witness my signature, and also each other's signatures." That he then signed, and the witnesses signed, one of them at his request filling in the dates.

These subscribing witnesses had all known him for many years, lived in the same village, and frequently saw him, knew that his health was feeble, and that he sometimes complained of pains in his head and kidneys; was accustomed to his ways, to conversing with him, and hearing him converse with others, and enjoyed unusual opportunities to observe any failing of his mental powers, or indications of mental weakness to which he might expose himself, and we may reasonably suppose that if they had harbored any suspicion that he was losing his mind or in-

capable of transacting ordinary business, they would have been on the alert and ready to make a memorandum of it on their minds on such an occasion as had called them together; yet none of them noticed anything in look, gesture, talk, or conduct that gave the slightest indication of incapacity or mental weakness; nor does it seem that any suggestion of that kind ever occurred to their minds. On the contrary, the facts and circumstances as they occurred, and are narrated by these witnesses, what was said and done, shows as conclusively as any occurrences of this kind usually do, that he fully understood and comprehended the nature of the business in which he was engaged, and the purpose for which he had invited them to his house. Not one of them at that time had the faintest idea that he was insane, much less had formed an opinion upon any facts or acts of his from which insanity was reasonably inferable. It is his capacity at that time to make his will which is the real point at issue. What his mental condition was before or after executing it is of no importance, only as it throws light upon his mind, and shows what its actual condition was when the will was executed. "Saw nothing wrong," nor "unusual," "thought he understood what he was doing," is the language of all these witnesses at the precise date when the will was executed.

It is true, several months after when this contest was begun, some of them at the time their testimony was taken expressed an opinion that he was of unsound mind at the time the will was executed; but it expressly appears that such opinion was not formed until a long time afterwards, nor do they claim otherwise. But the reasons assigned for such opinions are not entitled to a moment's consideration in law. This can be well shown by illustrations from the evidence. "Well, from what I have heard, I don't know what my opinion is. From what other men say who had dealings with him, I think something was not right with him in some way. *From what I have heard since* I don't think his mind was altogether sound at the time he signed the paper."

This opinion is not only based on hearsay but since the execution of the will, and is utterly worthless in law. More, it is in direct contradiction of the opinion he formed of the testator at the time the will was executed, and when he saw and observed the facts of which he testified. "I noticed nothing unusual in his conversation at the time, it seemed to be his free will; understood what he was doing. I suppose he was all right at the time; that was my opinion at that time." Another of them says: "From what the old man told me *since* he made his will in regard to the division he made with his children, etc., I believe there was something wrong." He depreciates as another witness does his incompetency to judge of his sanity, and says he does not understand what "a sound and disposing mind means." But it is perfectly manifest from his testimony that he did not consider him of unsound mind at the time of the execution of the will, but "from the knowledge I have got since," he says, "I am satisfied there was something wrong somewhere." Another says: "I thought nothing of the matter at the time, that is, his sanity at the time the will was signed, and for that reason could not have any opinion at all about the matter."

These references must suffice, but they are sufficient to show how valueless these changed opinions are for any purpose of this case. Based not on facts observed but hearsay, or the injustice of an inofficious will, formed long after its execution, and the after-thought of neighborhood discussion, in flat contradiction of the impressions they formed at the time, from what they saw and observed of the testator's capacity to make a will, and their solemn act in the attestation, such opinions are without legal or other merit, and must be disregarded. The facts and circumstances occurring at the execution of the will, and as narrated by them, are consistent with mental soundness, and this was the impression which such facts then produced on their minds, and is the best evidence of his sanity. At the argument a good deal of reliance was placed on the tes-

timony of Dr. Whiteaker as tending to establish *smile dementia*.

There is no doubt that the testator during the last year or so of his life was in feeble health, suffering some, and complaining a good deal, and at times peevish and querulous. But in examining the doctor's testimony it is important to note that it touches but two distinct periods, one in July, 1884, and the other in his last sickness, in which he undertakes to speak directly as to his mental condition. All other is speculative and inferential; nor does the doctor undertake to say what the actual consequence was, or would be, but only to state upon the data he had, what study and experience in that particular subject had indicated to often follow as the result of such symptoms or condition. For the uncontradicted facts remain that the testator, between the periods noted, often went on the streets of his village again, talked and dealt occasionally with his neighbors and friends, and attended public meetings, political and otherwise, and did those things usually done by persons of his age and condition, unnoticed and unsuspected by any one of insanity, or any such mental blindness as unfitted him for the ordinary transactions of life.

There is besides this his correspondence upon various matter within this period, to which we shall presently refer, that shows as conclusively as any act of the human mind can, that he had not only memory to retain and state facts which concerned his family, his will, and his business with accuracy, but to reason upon them with a sense and judgment which showed that he fully comprehended his own affairs and business, and possessed the capacity to direct and control them.

"In July, 1884," the doctor says, "*I believed his mind was affected, and during his last illness I knew his mind was affected.*" But he does not undertake to say what his mental condition was in the *interim* or at the time the will was executed, or do more than infer from the symptoms observed the consequences which might follow. But we all know, and the authorities already cited, and to which many

more might be added, show that old age, and the ills of distress, debility, and sickness, which often accompany it, do not incapacitate if the testator has possession of his faculties and understands what he is doing, and that such a condition may exist without perversion of the judgment. (*Sloan v. Maxwell*, 2 Green Ch. 581; *Dew v. John*, 2 Green Ch. 454; *Van Guysling v. Van Kuren*, 35 N. Y. 73; *Jackson v. Hardin*, 83 Mo. 176; *Hoban v. Piquette*, 52 Mich. 355.) It is not until the reason is invaded, followed by incoherence of ideas and a misapprehension of his relations to his family and society, that the testator can be regarded as insane and unfit to make a valid will.

Although many witnesses were examined on both sides, those for the proponents asserting his sanity, yet many for the contestants speak doubtfully in expressing their opinion, "thought something was wrong," "do not feel competent to judge," and like expressions, and some others who assert his insanity are without any reason for it, or if a reason is assigned, in many instances it is not satisfactory and shows a lack of knowledge and judgment in such matters. His daughter, Mrs. Cathey, did not think his mind was *very sound* at the time he made his will, and yet the testimony shows when she was applied to for a loan of nine hundred and fifty dollars only the day after the will was executed, and that she refused to make the loan until "she could see 'pap' about it, and if 'pap' said it was safe in loaning that much money on the land I could have it," and required the mortgage to be submitted to him "to see if it was all right." Evidently Mrs. Cathey then thought her father had sufficient capacity to understand business, and preferred his judgment to her own. Another says that about the time he made his will he "was not as sane as before," and the only reason he has for this opinion is, "was his complaining and physical and mental weakness." This witness does not say that he deemed him insane, and the reason amounts to nothing.

Two or three others think his mind was unsound on the subjects of money, politics, and woman suffrage, etc.; that

the enfranchisement of women would work the downfall of the republic. One says: "At times he appeared sane enough and at other times he did not," and his reasons were "a controversy about the newspaper dispatches." This witness and the testator were of opposite political faith, and disagreed as to the correctness of the Oregonian dispatches in the campaign of 1884. Now here is the reason which he gives that first caused him to think that the testator was "mentally wrong." "I told him the Oregonian would not publish anything detrimental to the cause it advocated, and he asserted that a public journal that took the associated press dispatches had to publish them."

The value of such a reason for such a purpose is not only worthless but undeserving of comment. We have not the space to review the evidence, but the truth is, the witnesses, with few exceptions, who undertake to impeach his mental soundness, do not claim to have observed it, much less to have formed any opinion in respect to it until the condition of the will began to be discussed, and after this proceeding was begun to set aside the will. It was the fact that he had not distributed his estate equally among his children, but had given marked preferences to some over others that bred discussion and comment, and men began to remember peculiarities and eccentricities of character, and to recall many things he said and did, which at the time they regarded as undeserving of notice, but that then appeared as *indicia* of mental aberration or unsoundness. But it would hardly be safe to set aside a will on the ground that the testator was not of sound mind because he had not distributed his property according to what might be a witness' notion of a testator's duty in that particular.

We must remember that the law concedes to every man of sound mind the right of saying to whom his property shall pass by last will. Here is the case of an old man feeble in health and perhaps wasting away with old age, who by his energy and thrift, his frugality and business

sagacity, had acquired a large fortune, and all admit retained mental stamina, judgment, and capacity enough to take care of it, and yet because in distributing it among his children he has made preferences in favor of those whom he thought would take best care of it, and not squander the hard earned and harder saved fruits of his toil, his will is attacked, his life ransacked and exposed, and we are asked to declare him insane and his will void. Chancellor Kent said: "It is one of the painful consequences of extreme old age, that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attention due to his infirmities." (*Van Alst v. Hunter, supra.*) But independent of these considerations, there are facts disclosed by the record which show that he did do business about this time with sense and judgment, which is better proof of his capacity to understand and comprehend such transactions than the mere opinion of witnesses, not founded on any actual business affair; that he was incapable of transacting business, and hence could not have made the will in dispute. It was during this period that he sold and assigned three mortgages, sold a large tract of land, made deeds, bought a piece of land for one of his sons, wrote numerous letters on business topics and other subjects which are full of good sense and judgment, and utterly refute the imputations of mental unsoundness; paid some bills, deposited five thousand dollars with Mr. Walker, taking his receipt therefor, canceled the Harpole mortgage and took a new one, and made numerous entries in his memorandum book.

No one pretends there was any lack of judgment or capacity displayed in transacting these important business matters, or that he did not understand and know what he was doing. Why, then, was he incapable of making his will? Take his letters to his attorney, written only a short time before the will in controversy was made, and when it is asserted that he was unable to transact business, and the

questions he propounds necessarily imply the power to reason and a knowledge of the subject suggested, so far at least as it concerns his own business affairs. He writes Mr. Willis: "If a man has a married daughter, and she has no children, and you was to deed to her and her body heirs, and she was to die without having children, having a husband, who would fall heir to that land, her brothers and her sisters, or her husband?" and then asks: "Does the word 'body heirs' include brothers and sisters and exclude husband?" requests his attorney to furnish him appropriate words to exclude the husband as heir of his wife. These are not the suggestions of a mind groping in mental darkness, but pertinent inquiries to the business he then had in contemplation. His daughter, Mrs. Cathey, was childless and he desired to deed land to her in such a manner as to exclude her husband.

There are several other letters to his attorney in respect to judgments, foreclosure suits, service, questions as to road tax, etc., all of which state the point of inquiry clearly and concisely, and show how well he understood, and what vigilant attention he gave to his business affairs. There are also several written to his son, one just before and another shortly after the execution of the will. In the one he gives him a copy of a form for an assignment of a note and mortgage, and then proceeds to advise him in respect to the matter, that the lawyer and the business man would both at once pronounce true and judicious, and then says: "Now let me in conclusion give you what I know from long experience to be good advice in business transactions, to wit, be very careful to have all your papers fixed up right, and don't depend on Dick and Tom's word too much, for everybody is willing to take and nobody is willing to give, and be sure not to take mortgages too near the value of the property, for, as a general rule, when you have to sell under execution the property will only bring about one half of what it is rated at when the mortgage is given." In the other he had bought a piece of land for his son, and says: "I got the whole square west of the Bob Clark claim and paid

\$200. I sent to Ware and got him to see if the title was clear, and to tell me how much land there was in a certain boundary. That little plat that I sent to him by Bob to fill out I will inclose in this, so that you can see exactly the land I bought for you. There is, you will see, 52.84 acres. When I was making the trade with Whiteset I suppose there was about 30 acres. He got it at 40 acres, but I was to have all in the plat, now you will see says 52.84, so as to make no jogs in that part of your land. . . . I paid for recording it. I have charged you in my book \$201—\$1 for recording. I think it is a good bargain for this reason, the three corner pieces is good land and suits your other lands."

We have not the space for further quotations, but these are sufficient to show how he thought and wrote and acted just before and after the execution of the will, and to strongly corroborate the testimony of Ware as to his sanity when the will was written, and to show why the subscribing witnesses saw nothing "unusual," and thought his mind was "sound," and that "he appeared to understand what he was doing" when they assembled at his house for the purpose of attesting his will. There is no doubt that the testator was in feeble health, and slowly passing out of life into the grave, but despite bodily ills and pains, the evidence shows, although his mind was less vigorous, that enough of that strong inherited common sense and resolute will remained to understand the nature of the act and its effects, the property he had, to whom he intended it should pass. Without regard to the evidence for the proponents, the evidence of the contestants taken as a whole does not show more than a case of an old man, feeble in health and suffering occasionally from bodily ills, growing peevish and querulous, and exhibiting at times mental weakness, but which does not show insanity or incapacity to know and understand, and appreciate what he was doing, whether of business or otherwise. Nor are the reasons assigned for the opinions entertained always worthy to be taken into account.

As a result it is our opinion that the testator was of sound mind when he executed the will in controversy, and

that it was the product of his own free agency. And in conclusion we may say that while it has been our duty to criticise some of the testimony, we would not have it inferred that we do not recognize in them good, reputable citizens, testifying to what they believed to be true, and as they understood and reasoned upon the facts.

On the question of undue influence we do not think there is any evidence to sustain the issue, nor was much attention given to it at the argument. And finally, in view of some facts and circumstances to which it is not necessary to refer, the costs and disbursements must be paid by the estate, of this court and the lower courts, and the decree of the Circuit court in all other things affirmed, and it is so ordered.

Testamentary capacity.—Burden of proof.—The rule laid down in the principal case that when a will is shown to have been duly executed, there arises a presumption in favor of the sanity of the testator, which, unless rebutted or overcome by counter-evidence, will be sufficient to authorize the probate of the will, is the prevailing doctrine both in England (*Cartwright v. Cartwright*, 1 Phillim. 100), and in most of the States of the American union. Wharton and Stille (*Med. Jur.* § 61) state upon sound authority that until habitual, permanent, chronic insanity be shown by the contestants, the presumption of sanity remains unrebutted *Clark v. Ellis*, 9 Or. 128; *Brown v. Riggin*, 94 Ill. 560; *Menkins v. Lightner*, 18 Ill. 282; *State v. Wellington*, 58 Me. 453; *Turner v. Rusk*, 53 Md. 65; *Ashey v. Stephens*, 8 Ind. 411; *Carpenter v. Carpenter*, 8 Bush. 283; *Lewis v. Baird*, 3 McLean, 55.

The mental condition of a testator at previous or subsequent periods of his life, does not invalidate a will made at a time when his sanity was not impaired. *Bundy v. McKnight*, 48 Ind. 502, 511. *Cf.* *Clark v. Ellis*, 9 Or. 128. Nor, on the other hand, does an insane condition of mind shown to have arisen after the will was executed, suffice as an objection to its admission to probate. *Taylor v. Creswell*, 45 Md. 422.

Thus, it will not shift the burden upon the proponents for the contestants to show that some time before the execution of the will the testator had been temporarily insane as the result of accident or violent sickness. *McMasters v. Blair*, 29 Pa. St. 208; *Halley v. Webster*, 21 Me. 461; *Little v. Little*, 13 Gray, 264, 266; *Townshend v. Townshend*, 7 Gill 10;

Hix v. Whittemore, 4 Met. 545; *Cartwright v. Cartwright*, 1 Phillim. 100. For example, previous epileptic attacks and suicide five days after the execution of a will, has been held in Louisiana, by a divided court, however, not to be sufficient evidence of insanity at the time of making the will to render it invalid. *Godden v. Burke*, 35 La. Ann. 160. So, also, evidence that the testator suffered from periodical epileptic convulsions, together with loss of consciousness, or that he had been delirious during a fever is not such evidence of chronic insanity as will throw the burden of proving testamentary capacity upon the proponents. *Brown v. Rigglin*, 94 Ill. 560.

There is much conflict of opinion, however, between the courts of the several States upon the question in point, and even between the decisions of the same court rendered at different periods of time; so that while the better doctrine is as stated above, there are not wanting many and eminent authorities requiring the propounder of the will to bear the burden of proof in the beginning (*McMechen v. McMechen*, 17 W. Va. 683; 41 Am. Rep. 682), and even throughout the proceeding. *Baldwin v. Parker*, 99 Mass. 79, 84; *Mayo v. Jones*, 78 N. C. 403; *Thompson v. Kyner*, 65 Pa. St. 368; *Robinson v. Adams*, 62 Me. 369; *Boardman v. Woodman*, 47 N. H. 120, 133; *Perkins v. Perkins*, 39 N. H. 163; *Turner v. Cook*, 36 Ind. 129; *Kempsey v. McGinnis*, 21 Mich. 123; *Aiken v. Weckerley*, 19 Mich. 402; *Taff v. Hosmer*, 14 Mich. 309; *Beaubien v. Cicotte*, 8 Mich. 9; *Williamson v. Robinson*, 42 Vt. 658. Cf. *Baxter v. Abbott*, 7 Gray, 71, 83.

But in those jurisdictions in which the burden of proof is in the first instance upon the contestants of the will, it will be shifted to the proponents upon proof of permanent, habitual, and chronic insanity; and the clearest evidence will be required to show that the instrument was executed during a lucid interval. *Delafield v. Parish*, 25 N. Y. 9; *Higgins v. Carlton*, 28 Md. 115; *Chandler v. Barrett*, 21 La. Ann. 58; *Rush v. Megee*, 86 Ind. 69; *Halley v. Webster*, 21 Me. 461; *Whitenach v. Stryker*, 1 Green Ch. 8; *Goble v. Grant*, 2 Green Ch. 629; *Baker v. Butt*, 2 Moore, P. C. C. 317; *Barry v. Butlin*, 2 Moore, P. C. C. 480; *Clark v. Fisher*, 1 Paige, 171; *Jackson v. Van Dusen*, 5 Johns. 144, 150; *Boyd v. Eley*, Watts. 66; *Hardin v. Hayes*, 9 Barr. 151; *Crowninshield v. Crowninshield*, 2 Gray, 524; *Nichols v. Binns*, 1 Swab. & T. 239; *Boughton v. Knight*, Law R. 8 Pro. & D. 64; *Steed v. Calley*, 1 Keen. 620; *Tatham v. Wright*, 2 Rus. & M. 1; *Brogden v. Brown*, 2 Addams, 445; *Agrey v. Hill*, 2 Addams, 210; *Borlase v. Borlase*, 4 Notes of C. 106; *Martin v. Johnston*, 1 Fost. & F. 123; *Beverley's Case*, 4 The Reporter, 123, b; *Kemble v. Church*, 3 Hagg. Ecc. 278; *Cartwright v. Cartwright*, 1 Phillim. 100; *White v. Driver*, 1 Phillim. 88. Except in Louisiana, in which State, even though the testator was habitually insane, yet, if his will was drawn without the assistance of others and contains nothing sounding in

folly, it is presumed to have been executed during a lucid interval. *Kingsbury v. Whitaker*, 32 La. Ann. 1055; s. c. 36 Am. Rep. 278.

The harshness of testamentary provisions is not in itself sufficient to controvert evidence of a lucid interval. *Frowert's Estate*, 11 Phila. 186.

A decree of lunacy is only *prima facie* evidence of testamentary incapacity during the time it continued in effect, and it may always be shown that the instrument was executed during a lucid interval. *Beach on Wills*, § 98; *Garrett v. Garrett*, 114 Mass. 379; *Johnson's Estate*, 57 Cal. 529, 531; *Little v. Little*, 13 Gray, 264; *Crowninshield v. Crowninshield*, 3 Gray, 524; *Pittard v. Foster*, 12 Ill. App. 133; *Searles v. Harvey*, 6 Hun, 658; *Taylor's Will*, Edm. Sel. Cas. 375; *Hull v. Warren*, 9 Ves. 605; *Bannatyne v. Bannatyne*, 16 Jur. 684; *Snook v. Watts*, 11 Beav. 105; *Cook v. Cholmondely*, 2 Macn. & G. 22; *Creagh v. Blood*, 2 Jones & L. 509; *In re Watts*, 1 Curt. 594.

In *Rice v. Rice* (50 Mich. 448), it is denied that the appointment of a guardian for one decreed to be incompetent to have the care of his property, is even *prima facie* evidence of want of testamentary capacity. See, also, to the same effect, *Pittard v. Foster*, 12 Ill. App. 133. *Cf. In re Pinney's Will*, 27 Minn. 280.

The New York Rule.—In New York the rule, as stated by Redfield, is, that the proponent is bound to show general competency to perform ordinary business transactions, and having done this, the burden is shifted from the proponent, and the contestant must then show that at the time of the execution of will the testator labored under a delusion, aberration or weakness of mind, or that the will was obtained by undue influence. *Redfield's Surrogates' Practice*, 222; citing *Allen v. Public Administrator*, 1 Bradf. 378; *Marvin v. Marvin*, 3 Abb. Ct. of Appeals Decs. 192. This also is the learning in *Delafield v. Parish* (35 N. Y. 9). But in an article in the *Albany Law Journal* of July 10th, 1881, by Thomas G. Shearman, the writer contends that in *Rollwagen v. Rollwagen* (63 N. Y. 504), the Court of Appeals, in endorsing the views, in part, of Davies, J. (the dissenting Judge in *Delafield v. Parish*), left the rule, as declared in that case, in doubt, and the question is still open in New York, and should be, as he contends, laid down contrariwise to the decision in *Delafield v. Parish*. He concedes, however, that *the precise point* had not subsequently been considered by the court of last resort. Since, however, the rule in *Delafield v. Parish* (35 N. Y. 9), has been followed as late as the year 1881, in *Miller v. White* (5 Redf. 320), and as recently as 1885, in *Potter v. McAlpine* (3 Dem. 108), it doubtless remains the existing law in this State.

See, also, *Frear v. Williams*, 1 Am. Prob. Rep. 85 (burden of proof); *Kingsbury v. Whitaker*, Id. 245 (burden of proof); *Key v. Holloway*, Id.

360, and the note (presumption of sanity and use of intoxicating drink); *Milton v. Hunter*, Id. 521; *Estate of Johnson*, 2 Id. 524, and the note (effect of drunkenness); *Rice v. Rice*, 3 Id. 128 and the note; *Yardley v. Cuthbertson*, 5 Id. 562, and the note.

WALL vs. WALL.

[128 Pennsylvania State, 545.]

NO POWER IN THE PROBATE JUDGE TO VALIDATE AN INVALID WILL.

An alleged testamentary writing presented for probate which does not in its form comply with the requirements of the statute is not a will, and the decree of the register admitting such a writing to probate is ineffective to make a will out of it.

ERROR to the Common Pleas of Alleghany County.

George C. Wilson, for the plaintiff in error.

Homer H. Swaney (with him *W. C. Erskine*), for the defendant in error.

WILLIAMS, J. The general rule on which the court below rested its ruling in this case is well settled. A decree of probate made by the register of wills is a judicial decree, and after the lapse of five years without appeal it is conclusive as to the real estate disposed of by it. This rule has been recognized and applied in many cases, among which are *Holliday v. Ward* (19 Pa. 485); *Cochran v. Young* (104 Pa. 333); *McCay v. Clayton* (119 Pa. 133).

But the general proposition thus affirmed must be understood as qualified by the same considerations that qualify the conclusiveness of judgments at law. Of these the

most obvious is that which relates to the jurisdiction of the court over the subject-matter and the persons affected by the judgment. If the court has no jurisdiction, it is of no consequence that the proceedings have been formally conducted, for they are *coram non iudice*. A judgment rendered by a justice of the peace in a cause over which he has no jurisdiction is void, notwithstanding service may have been regularly made on the defendant, and he may have failed to appeal or take a certiorari within the time prescribed by law. A judgment rendered in the Court of Quarter Sessions in a proceeding exclusively within the jurisdiction of the Common Pleas, and *vice versa*, is void for want of jurisdiction in the court rendering the judgment. So, although the court may have jurisdiction of the subject-matter, yet if there be no service, actual or constructive, on the defendant, the judgment is void for want of jurisdiction over the person to be affected. If such want of jurisdiction appear upon the record, it can be taken advantage of at any time and in any court where the conclusiveness of the judgment is the subject of judicial inquiry. The reason for this is found in the fact that the record of the judgment bears on its face the proof of its illegality and shows the want of power in the tribunal to render it. When it is offered as a conclusive adjudication between the parties, an inspection shows that it is not, because the court had no power to make an adjudication.

In the case now under consideration, the jurisdiction of the register is conferred by statute, and the limitations within which it is to be exercised are very plainly prescribed. Within these limits his decrees are conclusive. Outside of them he is without any authority to make a decree, and his decree if made is a nullity.

The act of 1833 provides that "every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction: and in all cases shall be proved by the oaths or affirmations of two or more

competent witnesses, otherwise, said will shall be of no effect." A writing that does not meet these requirements is not a will and the register cannot make a will out of it. If a deed in the usual form should be presented to the register as the will of the grantor, and proof should be made by two witnesses showing its execution and delivery as a deed, a decree of probate resting on such an instrument, and such proofs spread upon the record, could not change the character of the instrument or conclude any one interested. This was substantially ruled in *Bowlby v. Thunder* (105 Pa. 173). The action in that case, as in this, was ejectment. The register had probated two papers which were attached to a formal will as though they had been part of it. There had been no appeal from the decree and more than five years had elapsed. The party claiming under the will alleged that the decree of probate was conclusive as to the testamentary character of the attached papers. The court below, however, held otherwise, and this court affirmed its action, giving as a reason that "probating does not make a will." The ground on which the decision in *Bowlby v. Thunder* stands, is that the register had no jurisdiction over the writings attached to the will. They were precatory or advisory, and were for the guidance of the executor. Their character and his want of jurisdiction were apparent on the face of his record, and his decree was an absolute nullity.

The case at bar is still stronger. Isaac Wall, realizing the dangerous character of his sickness, desired to make a will and gave directions to a scrivener for its preparation. Before the writing was ready for his examination he died. He never saw the will which had been prepared for him nor knew its contents. It was presented to the register for probate in the same condition in which it left the hands of the scrivener, an unexecuted writing. This was enough to prevent its probate until the want of execution was accounted for in accordance with the act of 1833. The proofs produced instead of showing that the paper was approved by the testator, but its execution prevented by the extrem-

ity of his last sickness, showed very clearly that he had not examined it and could not have intended its execution, because he was dead when it was finished. The register was therefore without jurisdiction. The writing produced was not signed nor was the failure to sign accounted for, as the act of 1833 required in order to entitle the writing to probate.

In *Aurand v. Wilt* (9 Pa. 54), the action was ejectment, and the validity of the will of Peters was the controlling question. He was living when his will was written and brought to him, but he was unable to comprehend what was said about it and died without executing it. It was held that the will was not entitled to probate, and ROGERS, J., delivering the opinion of the court, said: "An opportunity must be given to have the will read and explained to him (the testator), which cannot be if before it is completed and ready for signing he becomes incapable of understanding and comprehending the contents. If at the time or before it is completed he either dies or ceases to be able to act understandingly, it cannot be admitted to probate."

Several cases have been cited which are thought to hold a different doctrine, but an examination will show that they do not. They are cases in which a will purporting to be signed by the testator was presented for probate. The fact that the will was executed gave the register jurisdiction to inquire into the manner of its execution, and the mental condition of the testator. Where he has jurisdiction, a decree, regular in form, will be aided by the presumption that all things necessary to be done have been rightly done. Presumptions may be resorted to in aid of a decree otherwise regular. But jurisdiction will not be presumed when the record shows the want of it. In such case the decree is a nullity.

Judgment reversed, and a *venire facias de novo* awarded.

See, also, *Piper v. Moulton*, 2 Am. Prob. Rep. 574; *Newton v. Seaman's Friend Society*, Id. 18; *Post v. Mason*, 8 Id. 43; *Crossman v. Crossman*, 4 Id. 121; *Byers v. Hoppe*, Id. 218; in the matter of *Skerritt*, 5 Id. 37, and the note.

FIDELITY TRUST COMPANY'S APPEAL.

[121 Pennsylvania State, 1.]

REVOCATION BY MARRIAGE.—NO REVOCATION WHERE THE LEGATEE SUBSEQUENTLY BECOMES THE TESTATOR'S WIFE.

The statutes which provide for the revocation of wills by the subsequent marriage of the testator are for the benefit of the widow in case of an ante-nuptial will. Accordingly, where a legatee five days after the execution of the will becomes the wife of the testator, such a marriage does not revoke the will and the widow is entitled to take under its provisions.

APPEAL from a decree of the Orphan's Court of Philadelphia County.

Albert A. Outerbridge and Furman Sheppard, for the appellant.

John G. Johnson and George W. Biddle (with them *A. Sidney Biddle*), for the appellees.

PAXSON, J. We see no difficulty in this case. We regard the question involved as a very simple one, notwithstanding the amount of learning expended upon it. The facts are substantially as follows: On January 20, 1859, George Whitney, a widower with one child, made his will in anticipation of marriage, by which he gave the one half of his estate (after deducting a legacy of \$5,000 to his sister-in-law) to his child, and the other half thereof to his betrothed. He was married to the latter five days thereafter. His will was placed in a sealed envelope directed to his executor, and handed to his wife, who kept it in her possession until his death, many years afterward, when she produced it. There were no children of this marriage, so that when George Whitney died, he left surviving him the one child by his former marriage, and his widow, Mrs. Sarah F. Whitney. The precise question is whether the widow takes under the will or the intestate laws, it being

alleged by the representatives of the child that under the act of assembly the marriage of the testator after the making of his will, was a revocation thereof.

The 15th section of the act of 1833, P. L. 250, provides as follows: "When any person shall make his last will and testament, and afterwards shall marry or have a child or children not provided for in such will, and die leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after-born, shall be deemed and construed to die intestate; and such widow, child or children, shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will."

The testator, as before stated, left no after-born children. We shall consider the act, therefore, only as it affects the widow. Its effect, in case of after-born children, will only be referred to incidentally. It may be observed just here that, by the terms of the act, the birth of a child after the making of a will has no effect upon such will, unless such child is unprovided for therein, and the amount of such provision is not important. In the case of an ante-nuptial will the question of a provision for the wife or widow does not arise. The act does not say in such instances, as it does in the event of after-born children, that the will shall be inoperative as to her, unless provision has been made for her in the will.

It would require much time and occupy an unnecessary amount of space, to review at length the legislation and judicial decisions in England and this country upon this interesting subject. This has been done elaborately and ably by the learned counsel on either side. They have given us all the learning bearing upon the case that is valuable. I shall confine myself to indicating the conclusions to which we have arrived without extended discussion.

We have no case in Pennsylvania which rules this.

Edwards' App. (47 Pa. 144) was much relied upon by the appellants, but a careful examination of it shows that it does not cover the case in hand. The decision there was, as nearly as I can gather it from the report: 1st. That the estate devised to Sarah Devitt was a fee simple; and 2d. that the provision in the will for the issue of Sarah Devitt was not a provision for the testator's child, as there was no evidence that the testator contemplated marriage when the will was made, and the provision itself was broad enough to embrace the issue of Sarah Devitt by another husband. The language of the opinion of Chief Justice Woodward was perhaps broader than the point decided, when he said: "The revocation as to the widow, I repeat, was absolute the instant of the marriage. It did not wait for her election, any more than it depended upon the provision made for her. And a will revoked is as if it had never been made." A similar view is indicated in *Walker v. Hall* (34 Pa. 483); but in that case the will was not made before the marriage. No fault is found with the decision of either of those cases, neither of which, however, rules the present one.

The section of the act of 1833, above referred to, does not use the word "revoked," in which it differs from the 16th section of said act, which declares: "That a will executed by a single woman shall be deemed revoked by her subsequent marriage, and shall not be revived by the death of her husband." The use of the word "revoked" in this section, and its absence in the preceding one, is clearly intentional. The will of a single woman is no doubt absolutely revoked by her subsequent marriage, and it is no longer a will for any purpose. But I am inclined to think that the word "revoked" has sometimes been applied inadvertently to the 15th section of the act of 1833. The English cases under the statute 1 Vict. c. 26, are not applicable, for the reason that said statute declares in terms that "every will made by a man or woman shall be revoked by his or her marriage." It is very clear, however, that under our act of 1833 an ante-nuptial will can be avoided by the widow, so far as her rights are concerned; that is to say,

she can elect to come in and claim her share of her husband's estate under the intestate laws. In all other respects the will stands. And if she does not elect to make such claim, the will is not affected in any respect.

This testator made a valid will. There can be no doubt that he intended to give his betrothed the one half of the residue of his estate. He not only intended it, but he acted upon his intention, as his will shows. And if the fact be, as is fairly to be presumed, that he not only gave the will to his betrothed to keep, but also communicated the contents of it to her, it is a serious question under some of our cases whether it was not something more than a will, and in reality a settlement of so much of his estate upon his future wife in consideration of marriage. Equity, which disregards the form and grasps the substance, would have no difficulty in reforming a testamentary paper, and declaring it a marriage settlement, where the consideration and circumstances justify it. This was done in *Lant's Appeal* (95 Pa. 279). But we are not required to decide such a point in this case. It rests upon other grounds.

We regard the 15th section of the act of 1833, which is a re-enactment of the act of 1794, as an enabling act. It was intended for the benefit of the widow or child, and to provide against the improvidence of husbands who should neglect to alter their wills in accordance with the changed circumstances caused by subsequent marriage or birth of issue. In no sense was it intended to benefit the husband or father. Being an enabling statute it is to be construed liberally, or as Blackstone says: "And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy:" (1 Bl. Com. 87.) The mischief was that many improvident husbands left no provision for their wives. The act declares for remedy that the widow, whether provided for or not, should have her share of the estate under the intestate laws. But the act does not force it upon her. It is hers if she elect to take it, not otherwise. Being for her benefit it is for her to elect to accept its benefits, and if the benefits under the will are

greater than under the intestate laws, the statute ought not to be enforced against her option. If we were in doubt as to this, a ready solution is found in the eleventh section of the act of 1848, which provides that the widow may take her choice of the bequest or devise made to her under any last will and testament, or of her share under the intestate laws. It will not do to say that this is not a will, that it was revoked by the marriage of Mr. Whitney, and that the statute of 1848 does not apply. It was a will, valid as to all the world except the widow, and valid as to her until she elected to claim her share under the intestate law. She elects to take the benefits under her husband's will and I know of no law or reason to prevent her.

The decree is affirmed, and the appeal dismissed at the costs of appellants.

See, also, *Milburn v. Milburn*, 3 Am. Prob. Rep. 544; *Swan v. Hammond*, 4 Id. 534; *Baldwin v. Spriggs*, 5 Id. 85, and the note; *Osgood v. Bliss*, Id. 97; *Hoitt v. Hoitt*, Id. 529, and the note.

HOLLAND vs. ALCOCK.

[108 New York, 312.]

TRUSTS FOR CHARITABLE OR SUPERSTITIOUS USES.—THE DOCTRINE OF CY PRES.

In New York the English doctrine of *cy pres* and the doctrine of trusts for charitable uses, as distinguished from private trusts governed by the general rules of law, do not prevail; and in general, the absence of a defined beneficiary, entitled to enforce its due execution is a fatal objection to the validity of a testamentary trust.

APPEAL from a judgment of the General Term of the Supreme Court in the second judicial department. The facts are set out in the opinion.

E. H. Benn, for the appellants.

I. Newton Williams, for the respondent.

David McClure, for the executor.

RAPALLO, J. The third clause of the testator's will is in the following words: "All the rest, residue and remainder of my estate I give and bequeath to my said executors, to be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." The validity of this clause is the question now presented for adjudication.

The action is brought by five nieces and a nephew of the testator, who claimed to be his next of kin and heirs-at-law, and, as such, entitled to his residuary estate in case the disposition thereof attempted to be made by the third clause of the will is adjudged to be invalid. The estate consists wholly of personal property, and amounted at the time of the testator's death, in 1882, to about the sum of \$28,000. By the second clause of his will the testator devised and bequeathed all his estate, real and personal, to his executors, *in trust*, for the uses and purposes set forth in the will, which were to pay certain legacies, amounting in the aggregate to about \$16,500, and to apply the residue as directed in the third clause, before recited. That clause must, therefore, be regarded as creating, or attempting to create, a trust of personal property for the purpose specified. The plaintiffs claim that the trust thus attempted to be created is void; that as to the residuary estate the testator died intestate, and that distribution thereof should be made among the next of kin, etc. The defendant Alcock, one of the executors, demurred to the complaint. At Special Term the demurrer was overruled and the plaintiffs had judgment. On appeal to the General Term that judgment was reversed and judgment was rendered in favor of

the defendant Alcock, thus affirming the validity of the third clause of the will. The plaintiffs now appeal.

Some of the points involved in the case now before us were passed upon in the late case of *Gilman v. McArdle* (99 N. Y. 451). In that case the deceased had, in her lifetime, placed in the hands of the defendant a sum of money on his promise to apply it to certain purposes during the lifetime of the deceased and of her husband, and after the death of both of them to pay their funeral expenses, etc., and to expend what should remain in procuring Roman Catholic masses to be said for the repose of their souls. This court declined to decide whether a valid trust had been created in respect to the surplus, there being no ascertained or ascertainable beneficiary who could enforce it, and the majority of the court expressly reserved its opinion upon that question, disposing of the case upon the ground that a valid contract *inter vivos*, to be performed after the death of the promisee, had been established; that there was nothing illegal in the purpose for which the expenditure was contracted to be made, and that there was no want of definiteness in the duty assumed by the promisor; and we held that as there had been no breach of the contract, but the promisor was ready and willing to perform, he was entitled, as against the legal representatives of the promisee, to retain the consideration.

The point upon which the majority of the court, in the case last cited, reserved its decision is now again presented. There is no contract *inter vivos*, but the will expressly bequeaths the fund in question to the executors, in trust for the purposes therein specified, one of which is to apply the residuary estate to the purpose of having prayers offered in a Roman Catholic church for the repose of the souls of the testator, of his family, and of all others who may be in purgatory. It is claimed that this disposition contains all the elements of a valid trust of personal property; that there are definite and competent trustees; that the purpose of the trust is lawful, and that it is sufficiently definite to be capable of being enforced by a court of equity, as the

court could decree the payment of the fund to a Roman Catholic church, or churches, for the purpose directed by the will. But if all this should be conceded there is still one important element lacking. There is no beneficiary in existence, or to come into existence, who is interested in or can demand the execution of the trust. No defined or ascertainable living person has, or ever can have, any temporal interest in its performance, nor is any incorporate church designated, so as to entitle it to claim any portion of the fund. The absence of a defined beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. It is said by WRIGHT, J., in *Levy v. Levy* (33 N. Y. 107), that "if there is a single postulate of the common law established by an unbroken line of decision, it is that a trust without a certain beneficiary, who can claim its enforcement, is void, whether good or bad, wise or unwise." It is only in regard to the class of trusts known as "charitable" that a different rule has ever prevailed in equity in England and still prevails in some of our sister States. Whether the English doctrine of charitable uses and trusts prevails in this State will be considered hereafter. In all other cases the rule, as stated by Judge WRIGHT, is universally recognized both in law and in equity.

It is claimed that the trust now under review is not void according to the general rules of law, for want of a defined beneficiary, because the trust is for the purpose of having prayers offered in a Roman Catholic church to be selected by the executors. It is contended that this is in effect a gift to such Roman Catholic church as the executors shall select, inasmuch as the money to be expended for the masses would, according to the usage, be payable to the church or churches where they were to be solemnized, and therefore as soon as the selection is made, the designated church or churches will be the beneficiary or beneficiaries, and entitled to the payment; that the trust is, therefore, in substance, to pay the fund to such Roman Catholic church or churches as the executors may select, and that a duly incorporated church, capable of receiving the bequest, must

be deemed to have been intended. Passing the criticisms to which the assumptions contained in this proposition are subject, and considering the trust as if it had been in form to pay over the fund to such Roman Catholic church as the executors might select, to defray the expense of offering prayers for the dead, the objection of indefiniteness in the beneficiary would not be removed. The case of *Power v. Cassidy* (79 N. Y. 602) is relied upon by the respondents as supporting their claim. In that case the bequest was of a fund to the executors in trust, to be divided by them among such Roman Catholic charities, institutions, schools or charities in the city of New York, as a majority of the executors should decide, and in such proportions as they might think proper. The opinion of the court, by MILLER, J., holds that giving full force and effect to the rule that the object of the trust must be certain and well defined; that the beneficiaries must be either named or capable of being ascertained within the rules of law applicable to such cases, and that the trusts must be of such a nature that a court of equity can direct their execution, and make no exception in favor of charitable uses, the bequest should be upheld as coming within the general rule; that the clause designates a certain class of objects of the testator's bounty, to which he might have made a valid, direct bequest, and that, by conferring power upon his executors to designate the organizations which should be entitled to participate, and the proportion which each should take, he did not impair the legality of the provision, so long as the organizations referred to had an existence recognized by law and were capable of taking and could be ascertained; that the evidence showed that at the time of the execution of the will and of the testator's death, there were in the city of New York incorporated institutions of the class referred to in the will, and that a portion of these had been designated by a majority of the executors; that none but incorporated institutions could lawfully have been selected, and that even if the executors had failed to make a selection or apportionment, the court would have had power to de-

creed the execution of the trust, there being no difficulty in determining what institutions came within the class described by the testator. It must be observed that in the case cited the beneficiaries were confined to Roman Catholic institutions of a certain class in the city of New York. These were necessarily limited in number. By 1 R. S. 734, section 97, it is provided that a trust power does not cease to be imperative when the grantee has the right to select any and exclude others of the persons designated as the objects of the trust. By section 93, that when the terms of the power import that the estate or fund is to be distributed between the persons designated in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any one or more of such persons in exclusion of the others. By section 100, that if the trustee of a power with the right of selection shall die leaving the power unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons designated as objects of the trust; and section 101, that where a power in trust is created by will, and the testator has omitted to designate by whom the power is to be exercised, its execution shall devolve on the Court of Chancery. Regarding these provisions as declarations of general rules applicable to all trust powers and governing trusts of personal as well as real property, the decision in *Power v. Cassidy* in no manner infringes upon the rule that the designation of a beneficiary entitled to enforce its execution is essential to the validity of a trust, and the only point as to which the correctness of that decision is open to any doubt is, whether, in fact, the beneficiaries in that case were sufficiently defined and capable of ascertainment to enable a Court of Equity to enforce the trust in their behalf. The view taken in respect to that point was certainly very liberal, but the court has in subsequent cases repeatedly announced that the decision was not to be extended, and it is evident that without a material extension it cannot be made to cover the present case. Here if the church or churches from among which the selection is to be made are to be re-

garded as the beneficiaries, they are not limited, as in *Power v. Cassidy*, to a Roman Catholic church or churches in the city of New York, but include all the Roman Catholic churches in the world. No one church or the churches of any particular locality can claim the benefit of the bequest. In this respect the case at bar is analagous to that of *Prichard v. Thompson* (95 N. Y. 76), where the bequest was of a sum of money to the executors to be distributed by them "among such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses" as the executors or the survivors of them might select, and in such sums as they might determine. This bequest was held void because of the indefiniteness of the designation of the beneficiaries. The opinion was written by the same learned judge who delivered the opinion in *Power v. Cassidy*, and by him distinguished from that case on the ground that in *Power v. Cassidy* the class of beneficiaries was specially designated and confined to the limits of a single city and to a single religious denomination, so that each one could readily be ascertained, and each had an inherent right to apply to the court to sustain and enforce the trust, while in the case at bar every charitable and educational institution within two states was included. This case (*Prichard v. Thompson*) also establishes that the power to the executors to select the beneficiary or beneficiaries does not obviate the objection of the omission of the testator to designate them in the will, unless the persons or corporations from among whom the selection is to be made are so defined and limited that a Court of Equity would have power to enforce the execution of the trust, or in default of a selection by the trustee to decree an equal distribution among all the beneficiaries.

This discussion has proceeded in answer to the claim that the church or churches where the masses were to be solemnized were the intended objects of the testator's bounty and the beneficiaries of the trust; but the correct-

ness of that position is by no means conceded. It is, however, not necessary to discuss it. If the bequest had been of a sum of money to an incorporated Roman Catholic church or churches duly designated by the testator and authorized by law to receive such bequests for the purpose of the solemnization of masses, a different question would arise. But such is not this case. The bequest is to the executors in trust to be by them applied for the purpose of having prayers offered in any Roman Catholic church they may select.

It has been argued that the absence of a beneficiary entitled to enforce the trust, is not fatal to its existence, where the trustee is competent and willing to execute it, and the purpose is lawful and definite; that it is only where the trustee resists the enforcement of the trust, that the question of the existence of a beneficiary entitled to enforce it arises. I have not found any case in which this question has been adjudicated, or the point has been made and it does not seem to be presented on this appeal. The case now before us arises on a demurrer by the defendant Alcock, one of the executors, to the complaint, on the ground that it shows no right in the plaintiffs. The complaint alleges that the defendant Alcock, together with Frederick Smyth, were named as executors in the will; that the defendant Alcock did not qualify and has never acted as executor or as trustee of the alleged trust sought to be created by the third clause, nor participated in any form in carrying out the same, but that his co-executor, Frederick Smyth, has taken possession of the whole estate as such executor and trustee. Smyth is not a party to this appeal. It comes up on the demurrer of Alcock alone, and there is nothing in the complaint to show that he is willing to execute the trust, but on the contrary it shows that he has in no manner acted or qualified himself to act therein. But aside from these considerations I do not think that the validity or invalidity of the trust can depend upon the will of the trustee. If the trust is valid he can be compelled to execute it; if invalid he stands, as to personal property un-

disposed of by the will, as trustee for the next of kin, and the equitable interest is vested in them immediately on the death of the testator subject only to the payment of his debts and the expenses of administration. When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use without accountability to any one and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor, which the alleged trustee cannot be compelled to perform, and which he has no right to perform contrary to the wishes of those legally or equitably entitled to the property, or who have succeeded to the title of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust in the performance of which no ascertainable person has any interest and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose.

It is contended, however, that charitable uses and trusts are not subject to the general rules of law upon this subject, and that the bequest now under consideration is of that class. The distinguishing features of this class of trusts as administered in England from an early period, were that they might be established through trustees, who might consist either of individuals or a corporation, and in the case of individual trustees, they might hold an indefi-

nite succession and be self-perpetuating, and the funds might be devoted in perpetuity to the charitable purposes indicated by the donor, while private trusts were not permitted to continue longer than a life or lives in being and twenty-one years and a fraction afterwards. The persons to be benefited might consist of a class, though the individual members of the class might be uncertain. The scheme of the charity might be wanting in sufficient definiteness or details to admit of its practical administration, and in such cases a court of equity would order a reference to a master in chancery to devise a scheme for its administration which should as nearly as possible conform to the intentions of the founder of the charity, and thus was called into operation what was known as the *cy-pres* doctrine. These charitable trusts were regarded as matters of public concern, and were enforceable by the attorney-general, although in many cases the court would compel their performance without his intervention at the instance of a town or parish, or of its inhabitants, or of an individual of the class intended to be benefitted, such as one of the poor, or maimed, etc. In a comparatively recent case argued in this court, many instances of ancient charities were cited which had been enforced by the Court of Chancery in England, such as *Cooke's charity*, decided A. D. 1552, whereby the testator ordered the purchase of lands and the erection of a free grammar school. *Bond's charity*, decided A. D. 1553, in which the testator's will, dated in 1506, directed that there should be established a Bede house at Bablock, and there should be built a chapel and therein one mass to be said on Sunday and therein to be ten poor men and a woman to dress their meat and drink, the priest to be a Brother of Trinity Gild and Corpus Christi Gild, etc. *Howell's charity*, decided 1557, whereby the testator directed his executors to provide a rent of 400 ducats yearly forever, to be appropriated each year to promote the marriage of four orphan maidens, honest and of good fame. This trust appears to have been enforced in chancery upon a bill filed by certain orphan maidens in behalf of themselves and oth-

ers. We were also referred to numerous other charities, for the support of the poor, for erection of almshouses, hospitals, maintaining school-masters, keeping churches in repair, and other similar purposes. In the case of *Bond's charity*, cited above, a license was granted by King Henry VII, in 1508, to the testator's son and others, to grant lands to support a priest to sing mass, and twelve poor men and one woman to say prayers and obsequies for the King, the brothers and sisters of the Gild, and for their souls, and especially for the soul of the testator, Thomas Bond, in the then newly erected chapel at Bablock. It appears that religious or pious uses were, when the Roman Catholic religion prevailed in England, recognized as charities. In 1434, Henry Barton devised to the rector of St. Mary and the church-wardens and their successors, certain lands at a perpetual rent payable to the guild of Corpus Christi, etc., so that said rector of St. Mary's and his successors, or their parish priests, when they should say prayers in the pulpit of the church, should pray for the souls of Richard Barton, the testator's father, of Dionesia, his mother, and for the souls of their children and all the faithful deceased, and in case they should neglect to do so for two days after the proper time, that the master and wardens of said guild, etc., should levy a distress upon said lands for twelve pence by way of penalty and retain such distress until such prayers should be said. This property appears to have been afterwards seized by the crown under the statute of chauntries (1 Edw. VI), and granted by Edward VI to one Stapleton, but the rector etc., of St. Mary's having re-entered, it was made to appear in a litigation between them and the successors in interest of Stapleton, that no prayer for souls had been made, nor had the rents of the premises been devoted to any manner of superstitious use within the space of six years and more next before the first year of the reign of King Edward VI, since which time the rents and profits had been employed by the parson and church-wardens of the parish in good uses and purposes. The case was tried

in the 22d and 23d Elizabeth, and the parish was allowed to retain the land for general charitable purposes.

The purposes for which charities were established in England were so numerous and varied, and the learning contained in the books on that subject is so vast that it would be futile to attempt to go into it in detail, or to do more than briefly refer to their history so far as is necessary to determine whether the English doctrine of charitable uses and trusts, as distinguished from private trusts governed by the general rules of law, still has any place in the jurisprudence of this State. The statute of 1st Edward VI, A. D. 1547, known as the statute of chauntries, recited that a great part of superstition and errors in Christian religion had been brought into the minds of men by reason of their ignorance of their true and perfect salvation, through the death of Jesus Christ, and by devising vain opinions of purgatory, and masses to be done for those who are departed, which doctrine is maintained by nothing more than by the abuse of trentalles, chauntries and other provisions for the continuance of such blindness and ignorance; that the amendment of the same, and converting them to good and godly uses, such as the erection of grammar schools, the education of youth, and better provision for the poor cannot, in the present parliament, conveniently be done, nor be committed to any person than to the king, who, by the advice of his most prudent council, can and will most wisely alter and dispose of the same. It then recites the act of 37 Henry VIII, for the dissolution of colleges, chauntries, etc., and enacts that all colleges, free chapels and chauntries not in the actual possession of the late or present king (with certain specified exceptions), and all their lands and revenues are declared to be in the actual seizin and possession of the present king, without office found, and that all sums of money, etc., which, by any conveyance, will, devise, etc., have been given or appointed in perpetuity towards the maintenance of priests, anniversaries or obits, be vested in the king. Certain colleges, free chapels and chauntries, such as those within the universities of Oxford and Cambridge,

and others specified in the statute, were exempted from its provisions, but the king was empowered to alter the chauntries in the universities. In this manner property which had been devoted by the donor to uses which had come to be regarded as superstitious, were, through the king, put to charitable uses which were deemed lawful, and this policy was carried out by many decrees of the Court of Chancery. The statute of 39 Elizabeth, A. D. 1597, authorized persons owning estates in fee-simple during twenty years next ensuing the passage of the act, by deed enrolled in the high Court of Chancery, to found hospitals, houses of correction, almshouses, etc., to have continuance forever, and place therein a head and members and such number of poor as they pleased; and such institutions were declared to be corporations, with perpetual succession. It will be observed that this was but a temporary act, which gave power only for twenty years next ensuing its passage to found the chauntries mentioned. This statute also contained a provision, entitled "An act to reform deceits and breaches of trust touching lands given to charitable uses," which recited that divers institutions had been founded, some by the queen and her progenitors, and some by other godly and well disposed people for the charitable relief of poor, aged and impotent people, maimed soldiers, schools of learning, orphans, and for other good, charitable and lawful purposes and intents, and that lands and goods given for such purposes had been unlawfully converted to the lucre and gain of some few greedy and covetous persons; and then proceeds to provide for the issue of commissions out of chancery to inquire into those wrongs, and decree the observance of the trusts according to the intent of the founders thereof. This statute was followed by that of 43 Elizabeth, chapter 4, "To redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses." This act is known as the statute of charitable uses, and was at one time, together with that of 39 Elizabeth, regarded as the foundation of the law of charitable uses and of the jurisdiction of chancery in cases of chari-

ties. But the reports of the record commission, established in 1819, have disclosed that the jurisdiction had been exercised and charity laws administered by the courts of chancery from a much earlier period. The act, however, throws light upon what were at the time considered and recognized as charitable uses, for they are enumerated in the preamble as follows, viz: the relief of the poor, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and schools in universities, the repairs of bridges, ports, havens, causeways, churches, seabanks and highways, the education and preferment of orphans. The maintenance of houses of correction, the marriage of poor maidens, the aid of young tradesmen, handicrafts, men and persons decoyed, the relief or redemption of prisoners or captives, the aid of poor persons in the payment of taxes. The act then provides for the issuing of commissions by the lord chancellor of England or the chancellor of the Duchy of Lancaster, and the redress of breaches of trust, as in the statute 39 Elizabeth.

In this enumeration of charitable uses there is none which would cover the present case; and, indeed, under the statute of chauntries and other statutes prohibiting superstitious uses, it would not have been recognized in England as valid as a charity or otherwise. But assuming, as perhaps we ought to assume, that before gifts for the support of priests, chauntries, etc., came to be regarded as superstitious uses, they were within the principles of charity, and that they became illegal only by virtue of the statutes against superstitious uses, in this State, where all religious beliefs, doctrines and forms of worship are free, so long as the public peace is not disturbed, the trust in question cannot be impeached on the ground that the use to which the fund was attempted to be devoted was a superstitious use. The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic church, of which the testator was a member; and those professing that belief are entitled in law to the same respect and protection in their religious observances thereof as those of any other denomination.

These observances cannot be condemned by any court, as matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here. (Const. U. S. amendment, art. 1; Const. of N. Y., art. 1, § 3.)

If in other respects the bequest was, by the law of England, valid as a "charitable" use, and the English doctrine of charitable uses prevails in this State, the objections to its validity on the ground of indefiniteness of the trust, perpetuity and the absence of an ascertainable beneficiary, can be overcome. Otherwise they must prevail, at least so far as relates to the absence of a beneficiary, which is sufficient to dispose of the case without reference to the other points. We will, therefore, treat the bequest as a charitable use.

The principal cases in this State in which the doctrine of charitable uses has been discussed are: *Williams v. Williams* (8 N. Y. 527); *Owens v. Missionary Society* (14 Id. 380); *Beekman v. Bonsor* (23 Id. 298); *Downing v. Marshall* (23 Id. 366); *Levy v. Levy* (33 Id. 97); *Rose v. Rose Beneficent Association* (4 Abb. Ct. App. Dec. 108); *Bascom v. Albertson* (34 N. Y. 584); *Burrill v. Boardman* (43 Id. 254).

These cases were argued by counsel of eminent ability, and in the arguments and opinions display a depth of learning and thoroughness of research which render it useless to attempt a discussion of the question here as an original question, or to do more than summarize the main points upon which the arguments turned, and ascertain how the case stands upon those authorities. So lately as the case of *Burrill v. Boardman* (43 N. Y. 254), the question was argued as still an open one, and that case was decided on the ground that the trust was valid without resorting to the doctrine of charitable uses. Comstock, J., in a note to the 11th edition of Kent's Commentaries (vol. 4, p. 305, note 2), states that the essential requisites of a valid trust are (1), a sufficient expression of an intention to create a trust; (2), a beneficiary who is ascertained or capable of being ascertained; that the appointment or non-appointment of a trustee of the legal estate is not material; that if the trust

or beneficial purpose be well declared, and if the beneficiary is a definite person or corporation capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether the grantor, testator, heir or next of kin, as the case may be, and that outside of the domain of *charitable uses* no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in delivering the opinion of this court, in *Beekman v. Bonsor* (23 N. Y. 310), the same learned judge says that the joint authorities of the cases of *Williams v. Williams* (8 N. Y. 525) and *Owens v. Missionary Society* (14 Id. 380) establishes the propositions (1) that a gift to charity is maintainable in this State if made to a competent trustee, and if so defined that it can be executed, as made by the donor, by a judicial decree, although it may be void, according to general rules of law, for want of an ascertained beneficiary; (2) that, in other respects, the rules of law applicable to charitable uses are within those which appertain to trusts in general; (3) that the *cy-pres* power which constitutes the peculiar feature of the English system, and is exercised in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or from the donor's true design, is unsuited to our institutions and has no existence in the jurisprudence of this State on this subject; but he declined to re-examine these cases, as he concludes that the law of charities could not be invoked in the case then under consideration. The same learned judge, however, in the subsequent case of *Bascom v. Albertson* (34 N. Y. 584), in which he acted as counsel, reviewed at length the question whether the English law of charitable uses prevailed to any extent whatever in this State. His argument was preserved in print and was used in *Burrill v. Boardman* (43 N. Y. 254); and in that argument, referring to what he had said in his opinion in *Beekman v. Bonsor*, as to the proposition that a gift to charities, if well defined and made to a competent trustee, was maintainable in this State, although it might be void, according to general rules of law, for want of an

ascertained beneficiary ; and to the similar remark, in his opinion in *Downing v. Marshall* (23 N. Y. 382), characterizes his own remarks in those two cases as a most inconsiderate repetition, as a *dictum* of a proposition laid down by another judge, calling attention to the fact that the repetition was a mere *dictum*, because in the two cases in which it was made the trusts were held void.

The case of *Williams v. Williams* (8 N. Y. 525) is the leading case in the court of last resort of this State in support of the doctrine that the English law of charitable uses is in force in this State, and it fully supports the proposition that it is. In that case the testator after making a bequest to an incorporated church bequeathed the sum of \$6,000 to Zophar B. Oakley and other individual trustees, with power to perpetuate their successors, as a perpetual fund for the education of the children of the poor who should be educated in the academy of the village of Huntington, with directions to accumulate the fund up to a certain point and apply the income in perpetuity to the education of the children whose parents' names were not upon the tax lists. The opinion was delivered by Denio, J., and concurred in by four of the other judges, three judges dissenting. The opinion held that this bequest, by the general rules of law, would be defective and void as a conveyance in trust for the want of a *cestui que trust* in whom the equitable title could vest, and could be sustained only by force of that peculiar system of law known in England under the name of the law of charitable uses ; that the objection that the bequest assumed to create a perpetuity would also be fatal if the Revised Statutes applied to gifts for charitable purposes. But the learned judge held, that according to the laws of England as understood at the time of the American Revolution, and as it still existed, devises and bequests for the support of charity or religion, though defective for want of such a grantee or donee as the rules of law required in other cases, would, when not within the purview of the mortmain act, be supported in the Court of Chancery ; that the law of charitable uses did not originate

in and was not created by the statute (43 Eliz. c. 4), but had been known and recognized and enforced before that statute, and was engrafted upon the common law, and consequently was not abrogated by the repeal in this State of the statute 43 Elizabeth in 1788 (Laws of 1788, chap. 46, § 37); that the provisions of the Revised Statutes did not affect property given in perpetuity for religious or charitable purposes, and that consequently the bequest of Zophar B. Oakley and others in trust for the children of the poor was valid. In *Owens v. Missionary Society* (14 N. Y. 380), the testator bequeathed the residue of his estate to the "Methodist General Missionary Society," an unincorporated association existing when the will was made and when it took effect in 1834, but which subsequent to the testator's death became incorporated. In a suit between the incorporated society and the next of kin of the testator the bequest was held void, and that the next of kin were entitled to the residue. Opinions were delivered by Selden, J., and Denio, J., and Judges A. S. Johnson, T. A. Johnson, Hubbard and Wright, concurred in the opinion of Selden, J., which held that the bequest was not valid as one made to the association for its own benefit, because of its incapacity to take, nor could it be sustained as a charitable or religious use, as it was not accompanied by any trust as to the application of the fund. Also, that where there was no trustee competent to take, our Court of Chancery had no jurisdiction to uphold a trust for a charitable or religious purpose, and it distinguished the case from *Williams v. Williams*, on the ground that there the bequest was to trustees competent to take. Although the tenor of the opinion is against following the example of the English chancellors in applying a peculiar and partial system of rules to the support of charitable gifts, Judge Selden disavows the intention of denying the power of courts of equity in this State to enforce the execution of trusts created for public and charitable purposes in cases where the fund is given to a trustee competent to take, and where the charitable use is so far defined as to be capable of being specifically executed by the authority of the court,

even although no certain beneficiary, other than the public at large, may be designated. Denio, J., while reaffirming the decision in *Williams v. Williams*, placed his vote upon the ground that the trust was not one which could be executed by the court as a charitable use, the purposes of the society being "to diffuse more generally the blessings of education, civilization and Christianity throughout the United States and elsewhere;" that although trusts in favor of education and religion had always been considered charitable uses, and were recognized as such in the statute of Elizabeth, the advancement of civilization generally was not classed among charities, and the whole fund might be disposed of for purposes promotive of universal civilization, which still would not be charitable objects in the understanding of the law. Six of the judges were of opinion that the charity was not sufficiently defined by the terms of the will, and that the judgment in favor of the next of kin should be affirmed on that ground. The next case in order is *Beekman v. Bonsor* (23 N. Y. 298). In that case the amount to be given to the charitable purpose, as well as the manner in which the fund was to be applied, was left to the discretion of the executors. They renounced, and it was held that the trust was incapable of execution; that the *cy-pres* power, as exercised in England in cases of charity, had no existence in this State; and that the next of kin were entitled to the fund. Numerous points were discussed in the opinion, which was by Comstock, J.; and he there made a *dictum*, which he afterwards recalled, that a gift to charity which would be void by the general rules of law for the want of an ascertained beneficiary would be upheld by the courts of this State if the thing given was certain, if there was a competent trustee to administer the fund as directed, and if the charity itself was precise and definite. *Downing v. Marshall* (23 N. Y. 366) held that a devise and bequest to an unincorporated missionary society were void on the same grounds as in the case of *Owens v. Missionary Society*. Up to this time the doctrine of the case of *Williams v. Williams*, as to the validity of trusts for charities,

even in the absence of a definite beneficiary, had been acquiesced in. But in *Levy v. Levy* (33 N. Y. 97), it was vigorously assailed by Wright, J., who discussed the question anew whether the English doctrines of trusts for charitable uses were law in this State. That learned judge expressed a decided opinion that they were not (p. 105, *et seq.*); that that peculiar system of jurisprudence proceeded, in disregard of rules deemed elementary and fundamental in other limitations of property, in upholding indefinite charitable gifts by the exercise of chancery powers and the royal prerogative; that it was not the exercise of the ordinary jurisdiction of chancery over trusts, but a jurisdiction extended and strengthened by the prerogative of the crown, and the statute of 43 Elizabeth, over public and indefinite uses, defined in that statute as charities; that even in England it had been deemed necessary to restrain and regulate by act of parliament the creation of these indefinite charitable trusts by the statute of mortmain and other restrictions; and it cannot be supposed that the system was deliberately retained in this State, freed from all legislative restriction. He calls attention to the fact that in 1788 the legislature of this State repealed the statute of 43 Elizabeth, the statute against superstitious uses, and the mortmain acts; that at that time it was supposed that the law for the enforcement of charitable trusts had its origin only in the statute of Elizabeth, and argues that the legislature of 1788 in thus sweeping away all the great and distinctive landmarks of the English system, must have intended that the effect of the repeal should be to abrogate the entire system of indefinite trusts which were understood to be supported by that statute alone, and that the whole course of legislation in this State indicates a policy not to introduce any system of public charities except through the medium of corporate bodies; that in 1784 the general law for the incorporation of religious societies had been enacted, and that before and contemporaneously with the repeal of the statute of Elizabeth and the statute of mortmain, special acts incorporating such societies were passed and other acts have been passed

creating or authorizing corporations for various religious and charitable purposes, in all of which are to be found limitations upon the amount of property to be held by such societies, thus indicating a policy to confine within certain limits the accumulation of property perpetually appropriated, even to charitable and religious objects; that the absolute repeal of the statute of Elizabeth and of the mortmain acts was wholly inconsistent with the policy thus indicated, unless it was intended to abrogate the whole law of charitable uses as understood and enforced in England. The opinion then refers to the course of legislation in this State following the repeal of the English statutes authorizing corporations for charitable, religious, literary, scientific and benevolent purposes, and in all cases limiting the amount of property to be enjoyed by them. This legislation is claimed to disclose a policy differing from the British system, and absolutely inconsistent with the supposition that uses for public or indefinite objects and of unlimited duration can be created and sustained without legislative sanction.

Since the case of *Williams v. Williams*, decided thirty-five years ago, there has been no adjudged case in this court which supports a charitable gift on the principles enunciated by Judge Denio in pronouncing that decision. Of course this observation applies only to the indefinite charity which the case included and not to the gift in favor of a religious corporation. After the decision of that case the struggle in this court for the overthrow of charitable uses began in the case of *Owens v. Missionary Society* (14 N. Y. 380). The opponents of such trusts had for their justification the repeal in 1788 in this State of all the British statutes which upheld such trusts in England, and the substitution of a charity system maintained by our statute laws in the form of corporate charters, containing by legislative enactment, power to receive, hold and administer charitable gifts of every variety known in the practice of civilized communities and our statute of uses and trusts, defining the trusts which may lawfully be created. This statute has

been held binding on the courts, although of course it ceases to operate when the legislature charters a corporation for a charitable purpose with power to take and hold property in perpetuity for such purpose. From the case of *Owens v. Missionary Society* (14 N. Y. 380), through the cases of *Downing v. Marshall* (23 Id. 366), *Levy v. Levy* (33 Id. 97), *Bascom v. Albertson* (34 Id. 584), *Burrill v. Boardman* (43 Id. 254), and *Holmes v. Mead*, decided in 1873 (52 Id. 332), the struggle was continued and the announcement definitely made, in the latest of those cases, that the controversy was closed by the adoption of the principles enunciated in the said last mentioned case. In *Williams v. Williams*, Judge Denio, whose great learning and ability are universally acknowledged, maintained as the basis of his conclusion in favor of charitable trusts as the law of this State, that they came to us by inheritance from our British ancestors, and as part of our common law. That particular postulate being finally overthrown and the British statutes having been repealed at the very origin of our State government, we should be a civilized State without provision for charity if we had not enacted other laws for ourselves. But charity, as a great interest of civilization and Christianity, has suffered no loss or diminution in the change which has been made. The law has been simplified and that is all. Instead of the huge and complex system of England, for many generations the fruitful source of litigation, we have substituted a policy which offers the widest field for enlightened benevolence. The proof of this is in the great number of charitable institutions scattered throughout the State. It is not certain that any political state or society in the world offers a better system of law for the encouragement of property limitations in favor of religion and learning, for the relief of the poor, the care of the insane, of the sick and the maimed, and the relief of the destitute, than our system of creating organized bodies by the legislative power and endowing them with the legal capacity to hold property which a private person or a private corporation has to receive and hold transfers of property.

Under this system many doubtful and obscure questions disappear and give place to the more simple inquiry whether the grantor or deviser of a fund designed for charity is competent to give; and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift. In *Williams v. Williams* (*supra*), in maintaining a gift for pious uses to an incorporated religious society, Judge Denio assigned the reasons which have been universally approved since that time; and they are summed up by saying, that charitable limitations of property, in favor of corporations competent by statute law to hold them, are valid or invalid on the same grounds as other limitations of property between natural persons, and are referable to the general system of law which governs in the ordinary transactions of mankind. From his reasoning in the other branch of the case before him, it appears that he had not reached the conclusion established in the later cases, namely, that with us charity is found in our corporation laws, general and special, which have been extended so as to embrace the purposes heretofore known and recognized as charitable, and which are continually extending and improving so as to meet the new wants which society in its progress may develop.

As the result of the foregoing views the judgment of the Supreme Court at General term should be reversed, and that of the Special Term affirmed.

All concur, except Earl, J., not voting.

Judgment accordingly.

Restrictions upon Alienation—the Statutes of Mortmain.—(a.) *Restrictions upon alienation unknown to the ancient common law.*—No restrictions upon the right of alienation were tolerated by the ancient common law. Prior to the Norman conquest limitations upon the power of testators to devise or of corporations to take and hold real estate were unknown. 1 Reeves' Hist. Eng. Law (Finlayson's ed.) 10, note a. 19; Allen's Royal Prerogative, 129, 142, 143; 1 Freeman's Norman Conquest, 57, 58, 62-64; 2 Hallam's Middle Ages, 278, 279, note ix; 1 Spence's Eq.

Jur. 20; 1 Bl. Com. 475, 478, 479; 1 Kyd on Corp. 78; Grant on Corp. 100; Angell & Ames on Corp. (11th ed.) §§ 110, 145; 2 Kent's Com. 281; Shelford on Mortmain, 27.

And while all property was held by an allodial title, which involved the absolute power of disposition, it was, nevertheless, from the earliest ages, subject to three inevitable burdens, the famous *trinoda necessitas*, imposed upon it for the public defense. These were not feudal obligations or services, but the duties owed by the subject to the sovereign, by the citizen to the commonwealth. "They were in fact the price paid to the commonwealth for its protection, or rather, they were the share which each member of the commonwealth was bound to take in the protection of himself and his neighbours." 1 Freeman's Norman Conquest, 62, 63; 1 Reeves' Hist. Eng. Law, 19.

This absolute title, however, was originally derived in every instance from the commonwealth or the crown. 1 Freeman's Norman Conquest, 57, 58; 1 Stubbs' Const. Hist. of Eng. 75, 76; Allen's Royal Prerog. 142, 143.

(b.) *Feudal restrictions upon alienation.*—Even after the Conquest, the strict law of feuds was never introduced into England. Lands were at no time held merely at the *will* of the lord, but by hereditary right; and at the death of the ancestor, the fee descended to the heir as his patrimonial estate. 1 Reeves' Hist. Eng. Law, 79, 80, note 1. But the right of the heir to enter upon his inheritance was clogged with conditions, among which was the inevitable fine or composition of relief, and he could neither dispose of his estate by will nor alienate it in his lifetime, without the consent of the mesne and chief lords. 1 Reeves' Hist. Eng. Law, 78, 75; 3 Reeves' Hist. Eng. Law, 275, note a; Stubbs' Const. Hist. 800, 801.

(c.) *Alienation by feoffment and livery of seisin.*—The method of alienation for ages at common law and under the feudal system had been by feoffment with livery of seisin. It was necessary to the proper feoffment of a feud or fee that it should be accompanied or followed by a formal *investiture*. Wright's Tenures, 37. This was known in later times, when alienation became more common, as livery of seisin. 1 Spence's Eq. Juris. 139; Green v. Lister, 8 Cranch, 229.

Such an investiture or livery was indispensable to a perfect title. If there were several in actual possession of land, and livery had been made to only one of them, he alone had the seisin. Litt. § 701; Cornell v. Jackson, 8 Cush. 508. So if the owner made two deeds of feoffment of the same land, and made livery to him who had the last deed, this passed the title, for he that had the last deed had the first seisin. Gilbert on Tenures, 77.

The deed without livery passed nothing, while the livery was good and available without any deed. Litt. § 66; Coke's Litt. 51 b.

Livery of seisin, then, was a condition precedent to a legal tenure. The title of the grantor passed with the livery and the tenure commenced, subject to the right of the lord to insist upon a forfeiture. The livery of seisin was complete, but the tenure or right to hold the property was imperfect until the lord waived his ultimate or superior right.

(d.) *Evasion of the feudal restrictions by feoffment to uses.*—The spirit of revolt against these feudal restrictions manifested itself in various devices for the alienation of property *inter vivos*, and in the important doctrine of *feoffment to uses* as a means of devising lands conformably to the will of the tenant. This device was favored by the courts, which ever made common cause with the people as against their feudal lords, and while the legal estate remained in the feoffees, equity regarded them merely as trustees, and made no scruple in requiring them to observe and execute the uses. 1 Spence's Eq. Jur. 439-446, 454, 455, 458; 3 Reeves' Hist. Eng. Law, 127-181, note a, 188, note a, 361, note a; Sugden's Introduction to Gilbert on Uses, 43-46.

And according to Lord Holt, the "greatest part of the estates in England during the civil wars were conveyed to uses, so that in the reports of the time of Edward IV (1461-1484) there are more of them mentioned than at any time before, and so being generally used they were licked into form and became the common conveyance." Jones v. Morley, 1 Lord Raymond, 291. This practice continued down to the reign of Henry VIII, and there was no form of transferring title better established in the law of England than that of uses as a common method of devising real estate. 3 Reeves, 142, note a, 172, note a, 274, note b, 276, note a; 1 Spence, 462; Vice-Chan. Hoffman in Wright v. M. E. Church, Hoff. Ch. 252.

It is a singular corroborative circumstance of this view that the statute for the *probate* of wills, 21 Henry VIII, chap. 5, was passed eleven years before the first statute of wills. 32 Henry VIII, chap. 1; 3 Reeves' Hist. Eng. Law, 427. It thus appears that the general power to alien and devise lands as well as to sell and bequeath personal property existed in full force and was recognized by the courts of justice long before the English Statute of Wills, so that the statute, instead of being, as is often stated, an enabling act, was merely dictatory of the existing law. Walker's Common Law, 10, 11.

(e.) *Statutes of Mortmain, limitations of testamentary and not of corporate power.*—The early restrictions on alienations in mortmain were founded on similar motives and subserved the same general interests. The alienation of lands to ecclesiastical corporations was specially injurious to the feudal lords, as it tied up the title in perpetuity, and deprived them, be-

yond recall, of tenants who could render any personal or military service. In the language of Sir Edward Coke, "By alienation in mortmain they lost wholly their escheats, and, in effect, their *knight's services* for the defense of the realm, wards, marriages, reliefs and the like; and, therefore, it was called a *dead hand*, for a dead hand yieldeth no service." 1 Coke's Litt. 2 b. It was never doubted, however, that at common law a corporation had the same capacity as a private person to take the title to real and personal property. 1 Kyd on Corporations, 78.

It was accordingly the received doctrine, proclaimed by an unbroken line of authorities from the time of Bracton to the present day, that mortmain restrictions were merely on *holding* and not against taking the title, and they were always confined to real property. Shelford on Mortmain, 2, 122; 1 Coke's Litt. 99 a; Kyd on Corporations, 79, 103, 104; Grant on Corporations, 98.

Perhaps the most carefully considered case on the subject to be found in the books is that of the Attorney General v. Downing, which was pending in the Court of Chancery for more than half a century. Ambler's Rep. 550, 571; 1 Dickens, 414; 8 Ves. Jr. 714; 5 Ves. Jr. 300; 8 Ves. Jr. 256. The will *devised* all the lands, tenements and hereditaments of the testator, after the failure of issue in tale male, to trustees for the establishment and maintenance of Downing College at Cambridge. The issue having failed, it was claimed on behalf of the heirs that the devise was void as a gift in mortmain. The case came to be heard before Lord Northington, Chancellor. Ambler states in his report, that "after having taken up a great length of time in argument, and before judgment was given, my Lord Northington was removed from the Great Seal, and Lord Camden succeeded, when it was argued again before him, assisted by Sir Thomas Sewell and Mr. Justice Wilmot, who all gave their opinion *in favor of the charity*." The opinions, however, are not contained in any of the regular reports. But the opinion of Lord Chief Justice Wilmot was published after his death in the collection known as Wilmot's Opinions. "It is observable," he says, "that these alienations in mortmain were never made void so as to let in the grantors or their heirs at law, but the laws only gave a right to the mesne lords and the king to seize them as forfeited; and, therefore, if they remitted their right, the alienation was good."

The same rule as to the capacity of corporations to take and hold the title to property has generally been recognized and maintained in this country. 2 Kent's Com. 281; Angell & Ames on Corp. (11th ed.) §§ 110, 145; Sherwood Case, 4 Abb. App. Dec. 227; Page v. Herneberg, 40 Vt. 81; People v. La Rue, 67 Cal. 526, 531.

It follows, as a necessary sequence, that a corporation, in the *absence* of an affirmative grant of power by statute, can always *take* title to property unless there is an express restriction or prohibition against it, either

in the charter or in a general statute applicable to the corporation; and this conclusion is in strict accordance with the uniform current of American authority. *Runyan v. Coster*, 14 Peters, 122; *Leasure v. Hilligas*, 7 Serg. & Rawle, 813; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Goundie v. Northampton Water Co.* 7 Penn. 283, 289; *Barrow v. Turnpike Co.* 9 Humph. (Tenn.) 308; *Jones v. Habersham*, 107 U. S. 175, 187, 188; *De Camp v. Dobbins*, 29 N. J. Eq. 36, 41; *Christian Union v. Yount*, 101 U. S. 352; *Alexander v. Tolleston Club*, 110 Ill. 65; *Hough v. Cook County Land Co.* 73 Ill. 28; *Hayward v. Davidson*, 41 Ind. 213; *Baker v. Neff*, 78 Ind. 68; *Chicago, &c. R. Co. v. Lewis*, 58 Iowa, 101, 113; *Cowell v. Springs Co.* 100 U. S. 55, 60; *McConihay v. Wright*, 121 U. S. 201, 215; *Mallett v. Simpson*, 94 N. C. 37, 41; *Banks v. Poitiaux*, 8 Rand. (Va.) 136; *Natoma, &c. Co. v. Clarkin*, 14 Cal. 545; *Telegraph Co.'s Case*, 22 Cal. 393, 430; *Baker Case*, 36 Minn. 185; *Girard College Cases* (U. S.) 127, 191; 7 Wall. 1, 14; *Mo. Valley Land Co. v. Bushnell*, 11 Neb. 192, 195; *Chambers v. St. Louis*, 29 Mo. 543, 576, 577; *Land v. Coffman*, 50 Mo. 243, 254; *Bybee Case*. 26 Fed. Rep. 586; *Hickay, &c. Co. v. Bufalo, &c. Co.* 32 Fed. Rep. 22; *National Bank v. Matthews*, 98 U. S. 621, 629; *National Bank v. Whitney*, 103 U. S. 99, 102; *Foster v. N. O. Bank*, 112 U. S. 440; *Barnes v. Suddard*, 117 Ill. 238.

(f.) *Mortmain restrictions founded on public policy and enforceable by the State alone.*—All mortmain restrictions are founded on public policy. They were never intended to subserve private interests, to enlarge or restrict private rights, nor to effect the *status* of the corporation, except in its relation to the sovereign power. The government, therefore, is the only proper party to determine whether the corporation ought to be pursued and punished for a violation of the particular franchise concerning the acquisition of property as well as of all other corporate franchises. *Banks v. Poitiaux*, 3 Randolph (Va.) 136, 142, 146; *Hayward v. Davidson*, 41 Ind. 213, 215; *Clarkin Case*, 14 Cal. 545, 553; *Leasure v. Hilligas*, 7 Sergeant & Rawle, 411, 416, 417; *Alexander v. Tolleston Club*, 110 Ill. 65, 72; *Cowell v. Springs Co.* 100 U. S. 56, 60.

It has accordingly been held in New York that a cause of forfeiture cannot be taken advantage of collaterally, or in any other mode than by a direct proceeding against the corporation, and the State, as the sole party in interest, may waive the forfeiture. *Matter of N. Y. Elevated R. R.* Co. 70 N. Y. 327, 338; *Moore v. Brooklyn, &c. R. R. Co.* 108 N. Y. 98, 104. This rule is universally admitted. *Girard v. Philadelphia*, 7 Wall. 2; *Tower v. Hale*, 46 Barb. 361, 365; *Adams v. Start*, 6 Hile. 271; *In matter of Presb. Church*, 7 How. Pr. 476; *People v. Manhattan Company*, 9 Wend. 351; *Trustees of Vernon v. Hills*, 6 Cow. 23; *Grant v. Coal Co.* 80 Penn. 209; *Angell & Ames on Corporations*, § 777, and cases cited.

"It would lead to endless embarrassments in the administration of

justice, if, in actions between private persons and corporations involving the rights and liabilities of the corporate bodies in their dealings with others, inquiries were permitted touching such collateral issues as the amount of property held and owned by the corporation, at different periods of its history, or as to the necessity of such property for the purpose of its incorporation." *Clarkin Case*, 14 Cal. 545, 558; *Cowell v. Springs Co.* 100 U. S. 56, 60.

There is no more reason why it should be permitted in reference to this question of capacity than in relation to other franchises, or the legal existence of the corporation itself. *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo, &c. Co. v. Cary*, 26 N. Y. 75; *Cayuga, &c. R. Co. v. Kyle*, 64 N. Y. 185; *Whitford v. Laidler*, 94 N. Y. 146, 151. It is accordingly laid down in the elementary treatises on this subject "that a conveyance of property or contract made by a corporation in excess of its charter powers will, nevertheless, be valid and binding as against a party who dealt with the company in good faith, and without notice of the illegality of the transaction. The penalty of dissolution may always be imposed upon an offending corporation by a proceeding *quo warranto* or *scire facias*."

This doctrine was first recognized and enforced in this country in the courts of Pennsylvania. *Leazure Case*, 7 Serg. & Rawle, 818; and it is suggested, in the opinion of the General Term, that its adoption there may be accounted for by the fact that the "English mortmain laws were in force" in that State. This view, however, would not account for the adoption of the same rule in other States, or in the Federal courts, where it is not pretended that the English acts were ever recognized as in force for any purpose. But the conclusive answer is that all limitations of power to transfer property to corporations are mortmain provisions, founded on the same policy of protection to the public against the excessive accumulation of property, and its retention in lifeless hands, where it is or may be withdrawn from general use and practically held in perpetuity. In *Downing v. Marshall* (23 N. Y. 886, 887), the chief justice speaking in this respect for all the judges, used this language: "It is said we have no mortmain policy or statutes. But this is not so. The exception in the former statute of wills was, with us, intended to prevent devises of real estate from being made to corporate bodies, where it would be locked up in perpetuity, and to prevent languishing and dying persons from being imposed upon by false notions of duty prompting them to disregard the claims of family and kindred. The positive statute we now have is still more distinctly founded in that policy, and it was enacted to solve the doubts which great learning and ingenuity had suggested. It is a statute of mortmain, resting on a mortmain policy, as distinctly as any act of the British parliament."

The rule at common law was well established that all debts and liabilities, those due to as well as those from a corporation, were *extinguished* at

its dissolution, and all of its *personal* property escheated to the *crown*. Grant on Corporations, 808, 804; 2 Morawetz on Corporations, § 1031, and cases cited. On the other hand all of its real estate reverted to the grantors and their heirs. 1 Bl. Com. 484; Coke's Inst. 18b; Grant on Corporations, 808; Attorney General v. Gower, 9 Mod. 226.

The reason of this difference in the rule is doubtless to be found in the old distinction as to the nature of the corporate title to real and personal estate. The title to personal property was absolute, while according to Blackstone "the law annexed a *condition* to every grant of lands, to a corporation, that if it be dissolved the grantor should have the lands again, the grant was only during the *life* of a corporation, which might endure forever; but when that life was determined by its dissolution, the grantor took back the lands by reversion, as in the case of every other grant for life." 1 Black. Com. 484.

Now, however, the rule is settled in this country, and particularly in New York, that a corporation takes the full title to *real* as well as to personal estate if such be the purport of the grant. Yates v. Van De Bogart, 56 N. Y. 526; Heath v. Barmore, 50 N. Y. 802; Vail Case, 106 N. Y. 283, 287; Nickoll Case, 12 N. Y. 121; People v. Moran, 5 Denio, 389; Page v. Heinburg, 40 Vt. 81.

"After the Revolution, therefore, lands became allodial, subject to no tenure, nor to any of the services incident thereto, and instead of going to the lord of the fee, reverted to the State as property without an owner, upon a principle of justice, that the whole community should hold the derelict property for the benefit of all. The supreme power of the State would succeed to them as the King would succeed to allodial property in England by the common law, upon the death of the owner without next of kin. In analogy, therefore, to the admitted condition of allodial property, and in conformity to the reason and justice of the thing, when the owner of real estate dies without heir, the State is *ultimus hæres*, and takes the property for the benefit of all." Matthews v. Ward's Lessee, 10 Gill. & John. 451.

Even when the land is acquired under the right of eminent domain for a special public use, the latter and better doctrine is that the corporation takes the absolute fee. Sweet Case, 79 N. Y. 293; Heyward Case, 7 N. Y. 314; Armstrong Case, 45 N. Y. 234; Rexford v. Knight, 11 N. Y. 308; Beal Case, 41 Hun, 173; Beach on Railways, §§ 782, 790.

In the language of Andrews, J., in the Sweet Case (79 N. Y. 301), the particular use declared is in the nature of a trust engrafted on the fee, and the people, through its proper officer, could compel the city (or corporation) to observe the trust, or restrain it from any use of the land inconsistent with it. The purpose expressed does *not qualify the estate taken*, but simply regulates and defines the use for which it shall be held. See, also, Armstrong Case, 45 N. Y. 212. The same rule has been recog-

nized and applied to grants and devises to charitable corporations. *Tower v. Hale*, 46 Barb. 361; *Sanderson v. White*, 18 Pick. 323. Indeed, the general common-law rule in this respect has never been adopted in this country, at least so far as creditors and stockholders are concerned, and in New York under the Revised Statute, the directors or managers of the defunct body became trustees of the property for the benefit, first, of creditors, and, second, of the stockholders. 1 Revised Statutes, 600, §§ 9, 10; *Owen v. Smith*, 31 Barb. 641; *Tinkham v. Borst*, 31 Barb. 407; *Tower v. Hale*, 46 Barb. 361; *Kenny v. Wallace*, 24 Hun, 479; *Heath v. Barmore*, 50 N. Y. 302.

The natural inference is, in the case of a charitable corporation having no stockholders, that the real as well as the personal estate, after the payment of debts, would escheat to the State; and that, if the cause of forfeiture be waived by the State and the corporation be permitted to survive its unlawful acquisition of lands, no private citizen will be heard to question its right to retain all of its accumulations of property. *Jones v. Habersham*, 3 Woods, 448; *s. c.* 107 U. S. 175; *Girard College Case*, 2 How. 127, 191.

If the title has passed by valid conveyance, it is no concern of the donor's heirs that the corporation has acquired or is holding more real estate than its charter authorizes. *Christian Union v. Yeunt*, 101 U. S. 353, 361; *Baker v. Neff*, 73 Ind. 68, 70.

The matters treated in this note are very fully and learnedly considered in the argument of Edward Countryman, Esq., of Albany, N. Y., as counsel for the appellants to the Court of Appeals in the *Matter of McGraw*, 111 N. Y. 66.

DEAKE, APPELLANT.

[80 Maine, 50.]

STATUTE OF LIMITATIONS.—LOST, SUPPRESSED, CONCEALED OR DEPORTED WILL.

When a will is fraudulently concealed by one interested in its non-production, the statutory bar of twenty years within which a will may be offered for probate does not commence to run until the will is discovered.

APPEAL from a decree of the Judge of Probate disallowing a will.

Nathan and Henry B. O'leaves, for the appellant.

Mattocks, Coombs and Neal, for the executors.

VIRGIN, J. This is an appeal from a decree of the judge of probate disallowing the proposed will of Benjamin Deake, late of Cape Elizabeth, deceased.

The report discloses the following, among other facts :

The testator resided for many years in this county and died here August 7, 1854, leaving real estate in Boston, real and personal estate in this county, and two sons, George and Charles Deake, his only heirs at law.

On November 21, 1854, no will having been produced or suggested, Charles Deake was appointed administrator on his father's estate.

Several years prior to 1873, Charles resided with his brother George, in Boston, and died there in December of that year, leaving one son (appellant) and two daughters, his only heirs at law.

George Deake died in Boston in 1885, leaving a widow, but no children.

Some months after Charles' decease in December, 1873, his daughter (Mrs. Brown), then about twenty years of age, while looking over some old letters and other papers at her uncle George's, took among others what now purports to be a holographic will of her grandfather (Benjamin Deake), the purport of which she did not then know, having incidentally taken it with the others out of mere curiosity, as specimens of his handwriting and signature; tied them together and carried them to New York, where she then resided, and never saw them afterward until found there by her brother (appellant), who, after the decease of his uncle George in 1885, having learned then for the first time, in an interview with the latter's widow, that the will was made, and having thereupon sought for it in vain among his

uncle George's papers, finally found it in the bundle of papers in New York, where Mrs. Brown unwittingly left it.

The will is quite lengthy, untechnically drawn, and phonetical in its orthography; but the intention of the testator is not left in doubt.

The only attestation clause preceding the signatures of the witnesses is simply the word "witness." But as the statute (R. S. c. 74, § 1) simply requires a will to be "subscribed in his (testator's) presence by three credible attesting witnesses," no *testimonium* clause is necessary. (1 Redf. Wills, 231, and cases in note.) The statute does not require the testator to sign in the presence of the witnesses, but does require them to subscribe in his presence, in order that he may identify the instrument which they subscribe as his will. (*Dewey v. Dewey*, 1 Met. 349; 2 Greenl. Ev. § 678.) They need not subscribe at the same time or in the presence of each other. (Ib.) They need not see him sign, his acknowledgment of his signature to each separately by word or act, accompanied with a request for them to attest as witnesses, is clearly sufficient. (*Stonehouse v. Evelyn*, 3 P. Wms. 254; *Hogan v. Grosvenor*, 10 Met. 56; *White v. Trs. Brit. Museum*, 6 Bing. 310.) They need not know that the instrument subscribed by them is a will; for the fact that it is in his own handwriting is sufficient evidence that the testator knew its contents and intended it to be his will. (*Osborn v. Cook*, 11 Cush. 532; *Ela v. Edwards*, 16 Gray 91, and cases there cited.) Moreover, when, as in this case, all the witnesses are dead, it is well settled that proof of the genuineness of the signatures of the testator and of the witnesses is *prima facie* proof that all the requisites of the statute have been complied with, especially when, as in the case in hand, the witnesses were men of character, and friends and neighbors of the testator. (*Hand v. James*, 2 Com. 531; *Crost v. Pawlet*, 2 Stra. 1109; *Nickerson v. Buck*, 12 Cush. 332; *Ela v. Edwards*, *supra*.) The will is proved to be in the handwriting of the testator, the signatures of the testator and of the respective witnesses are amply established

as genuine; and in the absence of any suggestion to the contrary, we consider the due execution of the will established.

The principal objection interposed to the probate of the will, proposed for the first time in November, 1885, thirty-one years after the decease of the testator, is based on R. S. c. 64, § 1, which, so far as applicable to this will, provides: "After twenty years from the death of any person, no probate of his will shall be originally granted." This bar is sought to be avoided under an exception thereto found in St. 1887, c. 108, which provides: "When an original last will is produced for probate, the time during which it has been lost, suppressed, concealed or carried out of the State, shall not be taken as part of the limitation provided in the first section." We are of opinion, however, that the provisions of that new statute cannot affect this case.

This report was made up at the April term, 1886, of the supreme court of probate, was entered at the succeeding July law term, when it was set down to be argued by both parties within ninety days; but the arguments were not filed until June, 1887. In the meantime the new statute was enacted and did not take effect until April 16, 1887, nearly one year after the case was set down for argument. So that the twenty years' bar had expired thirteen years before the new statute became effective.

Now, passing by the question whether the legislature had authority to revive the right of probating a will after it had become fully barred by the express provisions of the statute (*Atkinson v. Dunlap*, 50 Maine, 111, Wood Lim. 32), we are of opinion that a fair construction of the new statute will not allow it to affect this case. For it is one of the settled rules of the interpretation of statutes (though like all others subject to exceptions), that they shall always have a prospective operation unless the intention of the legislature is clearly expressed or clearly to be implied from their provisions, that they shall apply to past transactions. (*Bryant v. Merrill*, 55 Maine, 515.) We may well adopt the language of Kent, J., who, in speaking for the court in rela-

tion to another statute passed during the pendency of an action, said: "There is no language in the new statute which indicates any intension of the legislature to make it retrospective, or to interfere with actions pending. We never hold an act to be retrospective unless it is plain that no other construction can fairly be given." (*Rogers v. Greenbush*, 58 Maine, 397; see, also, *Garfield v. Bemis*, 2 Allen, 445; *Kinsman v. Cambridge*, 121 Mass. 558; *Harvey v. Tyler*, 2 Wall, 329; 1 Kent's Com. *455; *Dash v. Van Kleeck*, 7 Johns. 477; Smith's Cons. & St. L. § 172.)

But it does not necessarily follow, that because more than twenty years have elapsed since the death of the testator, his will may not now be admitted to probate. For fraudulent concealment of a cause of action has long been considered a good replication to a statute bar, in actions at law as well as in suits in equity (2 Sto. Eq. § 1521; *Sherwood v. Sutton*, 5 Mason, 143, 145, and cases; Wood Lim. § 275; Ang. Lim. ch. 18, § 4, *et seq.*), though judges have not always agreed respecting the grounds for the rule.

This question became *res judicata* in this State long before the separation. (*First Mass. Turnp. Corp. v. Field*, 3 Mass. 201.) The defendant in that case contracted to construct a turnpike for the plaintiff; did some of the work deceitfully, covered it with earth, but represented it completed and received his pay therefor. The defect having been discovered after six years, it was held, in an action for damages for the defective work, that the statute of limitations did not bar the action. Parsons, C. J., said: "If the knowledge of the defective work was fraudulently concealed from the plaintiff by the defendant, we should violate a sound rule of law if we permitted the defendant to avail himself of his own fraud."

This principle has been followed, approved and recognized in numerous cases, among which are: *Homer v. Fish* (1 Pick. 435); *Welles v. Fish* (3 Pick. 74); *Bishop v. Little* (3 Maine, 406); *Cole v. McGlathry* (9 Maine, 131); *Farnam v. Brooks* (9 Pick. 212, 244); *Nudd v. Hamblin* (8 Allen, 130);

Atlantic Bank v. Harris (118 Mass. 147, 153); *Carr v. Hilton* (1 Curt. 230, 237-8); *Bailey v. Glover* (21 Wall. 342, 348).

After the decision in *Turnpike v. Field* (*supra*), the legislature of Massachusetts enacted a statute of the same purport, which, in 1841, was followed by the legislature in this State, making it applicable only to the specific actions therein enumerated. (R. S. 1841, c. 146; R. S. c. 81, § 96.) This statute is merely declaratory of the common law, so far as it goes, and finds many illustrations in the cases cited on the margin of the section in the revision.

But to bring a case within the rule, actual fraud and concealment must be shown, *Cole v. Glathry* (9 Maine 131); *Nudd v. Hamblin* (*supra*), unless the fraud itself was *per se* concealment. (*Gerry v. Dunham*, 57 Maine, 334.) And if the plaintiff had ample means, in the exercise of ordinary diligence, to detect the fraud, he is chargeable with knowledge of it. (*McKown v. Whitmore*, 31 Maine, 448; *Rouse v. Southard*, 39 Maine, 404; *Farnam v. Brooks*, 9 Pick. 212; *Wells v. Child*, 12 Allen, 333, 335), or, in the language of Mr. Justice Miller, "when the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party." (*Bailey v. Glover*, 21 Wall. 348, and cases). Which proposition was reaffirmed in *Traer v. Clews* (115 U. S. 537-8).

This being the rule governing matters in law and in equity, we perceive no reason why it should not, but many reasons why it should also apply to wills fraudulently concealed.

Whether the facts in the present report are sufficient to bring the case within the rule we need not now inquire; for this question was not raised in the probate court or made a reason for the appeal, and hence the appellees have had neither occasion nor opportunity to meet it. But the facts apparent on the face of the report, such as the finding

of the will among the papers of persons interested in its non-production; their duty under penalty of imprisonment to deliver it to the probate court (R. S. 1857, c. 63, § 1); its non-delivery and the consequent deprivation of the appellant's property rights, especially when connected with the fact that the real property in Portland at least still remains in the family, as it did at the decease of the testator, all compel in us the belief that "law and justice require" us, under the authority conferred by R. S. c. 63, § 28, to remand the case to the probate court for the trial of the question whether or not the will in question was fraudulently concealed, where the parties can both be fully heard on such evidence as they may adduce.

If that question is determined in behalf of the appellant, the rights of all parties may be protected thereafter. (2 Redf. Wills, 8, and note; *Rebhan v. Mueller*, 114 Ill. 343; s. c. 55 Am. R. 869.)

Case remanded to probate court for the purpose mentioned above, and for further proceedings.

PETERS, C. J., WALTON, LIBBEY, EMERY and HASKELL, JJ., concurred.

See, also, *Haddock v. Boston & Maine Railroad*, 42, *supra*; *Keniston v. Adams*, 228, *infra*.

KENISTON vs. ADAMS.

[80 Maine, 290.]

DUTY TO OFFER A WILL FOR PROBATE.

Every instrument purporting to be the last will and testament of any person, should be filed in the probate court in due time after the testator's decease, and it is a punishable offense to withhold the instrument from the possession of the court.

APPEAL from a decree of the Judge of Probate upon an agreed statement of facts which are set forth in the opinion.

Joseph C. Holman, for the appellants.

E. R. Luce, for the appellee.

PETERS, C. J. An instrument left by a person at his death, as his last will and testament, should be filed in the probate office without fail. The person in whose custody it is may be more interested to suppress than to publish its contents. To prevent fraud or wrong, all wills should be open to a proper public inspection. Such is the implication of the statutory provisions for punishing the unwarrantable suppression or destruction of wills. The authorities all declare that this first step is of transcendent importance. The will, having been presented, may or may not be probated. There has been some discussion, in the cases, as to the extent of the discretionary powers of the probate judge in this matter. The true rule to be extracted from the cases is, that any person who believes himself interested in its provisions, and is not a mere intruder, if the executor declines to move in the matter, may ask that the instrument be probated. And much liberality must be extended to the petitioner by the judge, in the consideration of preliminary questions, because it cannot always be foretold who may be interested, or what the interpretation of the will may be. (Schoul. Executors, § 65; Bac. Abr. Executors; Bou. Law Dic. same title; *Stebbins v. Lathrop*, 4 Pick. 33.)

It will readily be seen, from the gravity of the questions presented, that we could very properly refuse to proceed in the present case further than to overrule the appeal and remit the proceedings to the court below for its action. But as all the questions which are ever likely to arise in the settlement of the estate have been fully argued, we think it expedient for the interests of all concerned to consider and decide the same now, and make an end of the litigation.

All persons who can possibly be interested in a construction of the will are represented before us, and the agreed statement shows that the testatrix, whose will is dated in 1867, died in 1885, leaving no father or mother, nor husband or children, but leaving brothers and sisters as her only heirs. In her will is this clause. "To my husband, Joshua Adams, I give the residue of my property, both real and personal, and so to his heirs and assigns forever." The facts further show that the husband died in 1881, leaving children by a former marriage (the proponent, Joshua R. Adams being one of them), and that no relationship existed between the husband and wife outside of their marriage. No creditors are interested. The heirs of the testatrix are desirous of a settlement among themselves, all of them being *sui juris*, to save the time and expense of a settlement in the probate court.

The proponent claims, for himself and his father's other children, an interest in the estate of the testatrix, upon two grounds.

In the first place, he contends that the bequest to his father did not lapse by his father's death before that of the testatrix, but that it was saved by force of section 10, c. 74 of the Revised Statutes, which reads as follows: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative had he survived." This presents the question whether, in a testamentary sense, a husband is a relative of his wife. Most, if not all, the authorities there are on the question declare that he is not. Our opinion coincides in that result.

A relative can only be one whose descendants would also be relatives. If the husband was a relative, then his son, the proponent, was. We think the statute intended to provide for a relationship by blood. If otherwise, it would have a very wide and somewhat indefinite application. We do not see good reason for the construction contended for. The result of its application in the present case would be

to give the wife's property to her husband's relatives in exclusion of her own. There may be good reason why a wife would provide in her will for her husband, but generally not much reason for a more extended provision towards his side of the family. If the family situation be such as to require the protection of stepsons, special bequests would most always be made for the purpose.

It has long been settled that, in the construction of wills, the word "relation," or "relatives," includes those who are entitled as next of kin under the statute of distribution. (Bou. Law Dic. 15th ed. Relations, and cases there cited). "A gift to one's relations does not, *prima facie*, refer to husband, wife, or marriage connections, but to those only of one's blood." (Schoul. Wills, § 537, and cases.) A grandson's widow is not entitled under a devise to grand children, nor does a gift to children extend to children by affinity. (2 Jarm. 5th ed. *121, *151, and Bigelow's notes.) Those rules may be varied by the context of a will showing different intention. It was once held in this State that a husband could be regarded as an heir of his wife, but that doctrine was overruled in *Lord v. Bourne* (63 Maine, 368). The precise point of the present case has been settled adversely to the petitioner, in *Esty v. Clark* (101 Mass. 36). Other cases help the argument directly or indirectly. (*Kimball v. Story*, 108 Mass. 382; *Drew v. Wakefield*, 54 Maine, 291; *Cleaves v. Cleaves*, 39 Wis. 96; *Wells v. Wells*, L. R. 18 Eq. 504.)

Upon another ground, it is claimed by Joshua Adams' children that they are interested in the will. The point is made that the words in the bequest, "and so to his heirs and assigns forever," are not descriptive of a fee to the husband, but of a life estate to him, and a remainder to his heirs. We have no idea that any such thing was intended. If it had been, the provision would have been much more significantly stated. It is too slight a ground to hang such consequences upon. It can be regarded as nothing more than a redundant expression. Numerous phrases may be found differing from the common form, but expressing the same

thing, and descriptive of a fee, such as, "A, his heirs" "A, and heirs," "to A forever," to "A and his assigns forever," "to A and his house," "to A and his family," and the like. (Schoul. Wills, § 549, and cases.)

It has been held by a considerable amount of authority that a devise to one "or" his heirs might be regarded as good to the heirs if the primary legatee dies in the lifetime of the testator. In such case the heirs take by substitution. Although a very refined interpretation, it has been resorted to in instances where justice can be best administered only by its application. (1 Jar. Wills. *339, note; *Hand v. Marcy*, 28 N. J. Eq. 59; *Brokaw v. Hudson's Executors*, 27 N. J. Eq. 135. And see cases cited in *Kimball v. Story*, 108 Mass. 382.) Some courts, however, think this interpretation rests upon too feeble a foundation to allow the heirs of the testator to be disinherited. (*Sloan v. Hause*, 2 Rawle, 28.) But courts have in some instances gone so far as to bring under the same rule devises running to a person named "and" his heirs, by making the word "and" read as if it were the word "or." But this has never been done unless the other provisions in the will require such a construction, and we can find no case where it has been permitted if the devise runs to assigns as well as to heirs.

Such a construction of the present devise is inadmissible for two reasons. First, there are no words in the will favorable to it. Secondly, the language here is to assigns as well as to heirs, and the power of assigning implies an absolute title. (1 Jarman, Wills, Big. ed. *517, and cases in note.) Even where the gift is to specified persons, "or their heirs or assigns," it is clear that the words are words of limitation only. No cases are found which maintain a different doctrine. (*Re Walton's estate*, 8 D. M. & G. 173; *Re Hopkins' Trust*, 2 H. & M. 411; *Dawes' Trusts*, 4 Ch. Div. 210.)

The case of *Hawn v. Banks* (4 Edw. Ch. 664), illustrates several points already spoken of. The words there are "and to her heirs." It was held that a devise standing on

those words alone would lapse, and it was further declared that the other parts of the will clearly required the word "and" to read as "or." Really, when we consider that the purpose of introducing the words "his heirs and assigns" into deeds and wills was to prevent the operation of the principle of primogenitureship, the words of the present devise are quite as apt for the purpose as any words would be. The idea is that the devisee may convey the property to assigns, and in failure of conveyance his heirs are to take. The words, "and so to his heirs and assigns," clearly declare that the devisee may alienate the estate or allow it to descend, and as he holds it so may his assigns or successors hold it.

Counsel for the heirs of the devisee intimates that the property devised came originally from the devisee. If the wife held his property in her name in trust for him, the remedy would be in equity to require the heirs of his wife to surrender the property to those who equitably own it.

As between the parties to the present litigation, we think the best disposition of the case will be to allow the will to remain probated, but to omit the appointment of an administrator, unless some one of the heirs calls for such, thus allowing the heirs to settle the estate among themselves, without the aid of the court, and to allow no costs to either party.

Decree accordingly.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

See, also, Deake, Appellant, 217, *supra*; Haddock v. Boston & Maine Railroad, 42, *supra*.

MARSTON *et al.*, PETITIONERS.

[79 Maine, 25.]

PROBATE OF A WILL.—WITNESSES.

The fact that a will contains a gift to a town in trust does not render a tax-paying resident thereof an incompetent witness to the will. Neither does the fact that the will provides for a legacy to an incorporated association render a stockholder thereof an incompetent witness.

EXCEPTIONS to the decree of the Judge of Probate. The opinion states the case.

D. D. Stewart, for the petitioners.

Webb & Webb (*William L. Putnam* was with them), for the executors.

VIRGIN, J. The petitioners seek under R. S. c. 63, § 25, for leave to enter an appeal from the decree of the judge of probate for this county, whereby an instrument, purporting to be the last will of the late Abner Coburn, was admitted to probate.

The petitioners contend that the judge did not have jurisdiction of the probate of this instrument because of a legacy of \$5,000 therein to Eleanor S. Turner, who is the judge's aunt by reason of her marriage, prior to the execution of the instrument, with a brother of the judge's mother; and the provision of R. S. c. 1, § 6, clause 22 is invoked to sustain the point.

We are of opinion that that provision, first enacted in the revision of 1841 for another and entirely different purpose, to wit: fixing the extreme limit of the disqualification by relationship of those to whom it was intended to apply, can have no possible application to judges of probate; for they were never required by statute to be disinterested by relationship in the estates of deceased persons. On the contrary, whatever may have been the rule at common law,

the legislature of this State, when probate courts were first established here, perceiving the great difficulties and confusion which would otherwise necessarily attend the probating of wills and granting administration on the estates of citizens deceased within the several counties, took in hand the whole subject matter of probate courts, their jurisdiction and the jurisdiction of the judges, and enacted a full, complete and independent code intended to reach every case that could arise; and subsequently made such alterations and additions as experience suggested, to meet new or omitted cases. Hence this court has repeatedly said: "Courts of probate are creatures of the statute, having a special and limited jurisdiction only. (*Fairfield v. Gullifer*, 49 Maine, 360.) We must look to the statute for the jurisdiction of such courts in a given case." (*Fowle v. Coe*, 63 Maine, 248.) And now we may add, what we had no occasion to decide then, to wit: to ascertain whether the judge of probate for a given county has jurisdiction for taking the probate of the will of a deceased inhabitant or resident thereof, we must look to the provisions of R. S. c. 63, which contain all of the present law on the subject. And this view is made morally certain by an examination of the legislation on this subject.

Probate courts were first established by statute in 1784. (Mass. St. 1784, c. 46; *Wales v. Willard*, 2 Mass. 124.) The subject was more thoroughly examined by the General Court in 1817 and resulted in an act of forty-five sections. Section one established a probate court in each county and provided for the appointment of "some able and learned person as judge therein for taking the probate of wills and granting administration on the estates of persons deceased being inhabitants of, or residents in, the same county, at the time of their decease." (St. 1817, c. 190, § 1.) Section 5 provided: "Whenever any judge of probate shall be interested in the estate of any person deceased within the county of such judge, 'the estate shall be settled in another county.'" And the Supreme Court decided that when the judge of probate for the county where a person deceased

had jurisdiction of his estate, the acts of any other judge of probate on such estate are void. (*Cutts v. Huskins*, 9 Mass. 544; *Holyoke v. Huskins*, 5 Pick. 25.)

In 1821, in establishing and defining the jurisdiction of probate courts and of the judges thereof in this State, the legislature passed an act, comprising seventy-five sections, adopting literally most of the provisions of the Mass. St. 1817, c. 190, and including the subject of guardians. But instead of re-enacting a transcript of § 5 of St. 1817, with its simple general provision ("whenever any judge of probate shall be interested in the estate of any person deceased within the county of such judge," the estate be settled in another county); our legislature defined specifically the disqualifying interest to be that of an "heir, legatee, creditor or debtor, or within the degree of kindred which by the laws of the State he might by any possibility be heir in the estate of any person deceased within the county of such judge." (St. 1821, c. 51, § 2.) And this comprehensive and clearly defined interest constituted the only exception which precluded or excused a judge of probate from taking the probate of the will of any deceased inhabitant of his county.

To exclude all cavil, the legislature at its next session amended the St. of 1821 by an act of a single section expressed in the positive, unqualified, peremptory language following: "The estates of all persons deceased shall be settled in the probate court of the county where the deceased was last an inhabitant, unless the interest of the judge of probate in such estates, as heir, legatee, creditor or debtor, shall exceed the sum of \$100, any law to the contrary notwithstanding." (St. 1822, c. 198.) The object of this statute would seem to be both declaratory and amendatory; to construe the previous statute as to the general jurisdiction and to fix the minimum limit of personal pecuniary interest which should disqualify a judge of probate. And these provisions of the Stats. 1821 and 1822 remained unchanged and were in substance put in two sections by the revision commissioners and re-enacted in R. S. 1841, c. 105,

§§ 3 and 18, the latter containing the provisions as to the disqualifying interest.

In 1841, while the first revision of the statutes was being made, a statute was enacted for transferring to another county the uncompleted settlement of an estate whereof the executor, administrator or guardian had received the appointment of judge of probate. (St. 1841, c. 149, § 1.) This provision suggested an additional disqualifying interest not previously covered. A few days thereafter, and to condense and make § 18 of the revision consistent, the same legislature, by the general "Act of Amendment" appended to the revision, provided: "Chapter 105, § 18 shall be amended by striking out the words 'as heir, legatee, creditor or debtor or,' and inserting instead thereof, 'either in his own right or in trust, or in any other manner, or be,' so that the section, as amended, shall be as follows: 'Whenever any judge of probate shall be interested, either in his own right, or in trust, or in any other manner, or be within the degree of kindred, by means of which by law he might, by any possibility, be heir to any part of the estate of any person deceased,' such estate shall be settled in another county; 'provided, that the amount of the interest of such judge shall not be less than \$100 in such estate.'" (R. S. 1841, c. 105, § 18, as amended by "Act of Amend." of April 14, 1841, § 15.)

By the foregoing amendment the substituted words: "in his own right," obviously included the direct personal interest previously described as that of "an heir, legatee, creditor or debtor," while "in trust" were evidently intended to cover any indirect, representative interest which the judge might have strictly as trustee, or as executor, administrator or guardian; and to make sure of comprising every pecuniary relation of a judge to an estate within his county, the legislature added in the same connection, *nasci a sociis*, "or in any other manner." The "kindred" clause which immediately follows, and the fixed money limit of interest make certain this construction. This part of § 18, save the redundant words, has been re-enacted in the several

successive revisions, and appears in the plain language now found in R. S. c. 63, § 8.

Moreover, that the legislatures of 1874 and 1883 believed that the phrase "in any other manner" had no reference to any interest by "relationship within the sixth degree," appears morally certain from the following considerations: When probate courts were established and their jurisdiction and that of the judges were defined in St. 1821, c. 51, their power to appoint guardians in their county was comprised in the same section with that of probating wills and granting administration on estates of deceased persons, § 1; and the disqualifying interest mentioned in § 2 was alike applicable to judges, whether acting in relation to estates or to guardians. But in the first revision of the statutes (1841), the provisions relating to guardians were separated from those concerning the estates of deceased persons, and put into different chapters; the latter in c. 105, and the former in c. 110. And while c. 110, § 1, conferred power on a judge of probate to appoint guardians to minors residing in his county, that chapter contained no exception by way of a disqualifying interest. Hence the legislature, in 1874, amended the unqualified language of c. 110, § 1, by adding: "But when any judge is interested, either in his own right, in trust, or in any other manner, or *within the sixth degree of kindred*, such appointment shall be made in an adjoining county. (St. 1874, c. 156.) Both of these chapters (R. S. c. 63, § 8, and c. 67, § 1) were revised by the same learned commissioner and legislative revision committee of 1883, and literally re-enacted by the legislature of that year; and if the same construction was intended for the disqualifying interest in both sections, they would hardly be expected to express it in such widely different language.

If it be objected that the judge would not be the proper person to try the question, had such been raised, whether or not his aunt, by undue influence, procured the will to be made, the answer is we are construing the statute, and if that constitutes him the tribunal to pass upon that question, he must do so, as there would be no other (*Com v.*

Ryan, 2 Mass. 89, 91); and his decision, if not satisfactory, could be tested on appeal by the aggrieved party.

There being no pretension or suggestion that the "kindred" clause in c. 63, § 8, can have any possible application to this case, our conclusion is, that the judge of probate who admitted the will to probate had jurisdiction. If he had, then as before seen no other judge could have except under the conditions mentioned in c. 63, § 5; none of which existed here.

We are aware that the practice in Massachusetts and New Hampshire, under their peculiar constitutional and statutory provisions, is different. They class probate courts with all inferior tribunals. *Hall v. Thayer* (105 Mass. 219, and cases there cited); *Aldrich, Appt.* (110 Mass. 189); *Moses v. Julian* (45 N. H. 52); *Stearns v. Wright* (51 N. H. 600); *Perkins v. George* (45 N. H. 453). And in the latter State, when the judge is interested otherwise than is provided by their statutes, and therefore has no jurisdiction, the practice is for him to decline to act and take the case up by appeal. (*Perkins v. George, supra.*) Such practice has never obtained in this State. (*Hatch v. Allen*, 27 Maine, 85.)

As the judge of probate had jurisdiction in this case, his decree is conclusive, in the absence of any appeal therefrom, even if the witnesses were beneficially interested. *Piper v. Moulton*, (72 Maine, 155, 158, and cases cited there.)

But while no appeal was taken within twenty days from the date of the decree, as required by R. S. c. 63, § 23, without any discrimination in favor of non-residents, the petitioners asked the Supreme Court of Probate sitting in the county of Somerset to allow them to enter an appeal for the reasons set out in their petition, which, if granted, would "have the same effect as if it had been seasonably done." (R. S. c. 63, § 25.)

To authorize the granting of their prayer, the petitioners were bound to satisfy the court that they "omitted to claim an appeal" within the twenty days next succeeding

the date of the decree, "from accident, mistake, defect of notice, or otherwise without fault on their part;" and thereupon, "the Supreme Court, if justice requires a revision, may upon reasonable terms, allow an appeal to be entered." (R. S. c. 63, § 25.)

The presiding justice denied their prayer and directed their petition to be dismissed. He must, therefore, not only have determined, as we have—that the judge of probate had jurisdiction, but also, that the petitioners, at least, had failed to sustain the burden of satisfying him that "justice required a revision."

The petitioners' allegations under R. S. c. 63, § 25 are, that they had no notice or knowledge whatever of the existence of any such will, until Jan. 26, 1885, or that it had been or would be offered for probate on Feb. 3, until Feb. 26, when the time for appeal had expired; that they should "surely and certainly have appealed within the twenty days, had they known it;" that their omission to seasonably appeal "was wholly without fault on their part;" that they were deprived of notice "by the accidents growing out of the situation and their great distance from the probate court; and that "justice requires a revision of the decree."

A careful and patient consideration of the voluminous evidence filed, has failed to satisfy us of the truth of any of these allegations which are material to the matter before us.

The petitioners are a nephew and niece of the testator, resident in San Francisco, having a father in Waterville, a sister and brothers in Skowhegan, one of which brothers was the duly constituted agent of the nephew. The petitioners were in "frequent consultation," the nephew doing all the writing for both. The statute requires no personal notice, and the general notice by publication was given. The testator died January 3, 1885, of which the petitioners were apprised by telegram received January 4th. The will was read, by the executor who wrote it, to the resident heirs, and twice to the nephew's agent, in the evening after

the funeral on January 7th. One of the California heirs—a brother of the petitioners—was a subscriber to the Skowhegan newspaper which contained a copy of the will in its issue of January 14th. Both of the petitioners must have known there was a will of some kind. The nephew visited his friends in Skowhegan about a year after the will was executed, where he tarried some months, and then declared to one of the executors—what was a matter of great notoriety—that “he supposed his uncle had made a will and that it was understood the property generally went out of the family;” and he substantially admitted, by declining to deny when pressed, that he read in the California daily newspapers, within a week of the testator’s death, dispatches announcing that the testator had bequeathed the bulk of his property to the cause of education. Moreover, prior to February 28th, his agent wrote to him and his co-petitioner “every few days, oftener than once a week,” and his sister in Skowhegan had “written to all about everything, twice to his (agent’s) certain knowledge.”

That any number of these non-produced letters miscarried is utterly inconsistent with common experience under our efficient postal service, and with unsatisfactorily explained expressions in their letters, such as that of March 5th, where it drops out that they knew, as early as February 5th, that executors had been qualified. And that several of these letters have been purposely withheld, among them that which accompanied the copy of the will, is evident from the petitioners’ utterly irreconcilable testimony relating to the search for them, together with their very distinct recollection of the dates of some letters received and their obliviousness as to the dates of others and of their contents.

If they did not actually know the precise terms of the will until January 26, they must have known its substance—that they were not to share the whole property. That a large part of it was going to charitable objects had become so notorious when the nephew was in Skowhegan, a year after the will was made, as to call from him the remark al-

ready mentioned. Having as much at stake as they did, and considering the ill effect of delaying the settlement of the estate, ordinary care and diligence, which the law requires, demanded that they should be active and make use of all such reasonable means as were within their reach to obtain the information, if they had not already done it, necessary to enable them to prosecute their right of appeal. They knew in February that their present counsel was in California, and had had some communication from him, for on March 3d "he (nephew) had been waiting a few days to see him."

But it is obvious that they had no intention of appealing at any time after January 26 and before February 23, hence their non-residence placed them in no better situation than they would have had if residents. We are not satisfied, therefore, that their omission was not without fault on their part; but, on the contrary, that gross laches and culpable negligence were the cause of their non-action.

Thus where an analogous remedial statute (R. S. c. 77, § 19) authorized the Supreme Court, on a bill in equity, to give a creditor judgment for his claim which he did not seasonably present to the administrator on his debtor's estate, provided, *inter alia*, the "creditor is not chargeable with culpable negligence," it was held in Massachusetts, under a like statute, that a bill alleging that the complainant resided in Montreal and did not know of the debtor's decease, or of the appointment of the administrator until the special limitation bar had intervened, could not be maintained. The court said: "The only ground on which he can rest his claim is, that he resided in the remote city of Montreal, and had not been informed of the debtor's decease. The facts can hardly be said to present anything more than a case of mere neglect and inattention. He failed to make an effective inquiry, and in that way remained in ignorance of a fact which was, of course, perfectly well known, and which there was no attempt to conceal. The formal notice required by law and directed by the probate court was given. The only mistake is the failure to know a fact about

which he made no inquiry." (*Sykes v. Meacham*, 103 Mass. 286.)

Again, the petitioners were guilty of negligence in prosecuting their petition. It is of the utmost importance that an estate of this magnitude, comprising more than one million four hundred thousand dollars of "rights and credits," should, as speedily as the law will allow, come into the possession of the rightful administrators for proper distribution. The petitioners not only had no intention of seasonably appealing, but even the nephew did not conclude to prosecute the petition until shortly before its date in September, and the niece, as late as August 25, wrote: "Lon (nephew) is very anxious I should sign all papers with him, and come in to help pay the expenses, I suppose, if he fails to get a compromise." But it seems she succumbed, for on October 26 she wrote: "No wonder you were astonished to see my name, but I could not get out of it. He (nephew) annoyed me so much that I finally decided to go in with him for better or worse. If I make nothing out of it, he says he will pay all the expenses."

While the law affords to parties a year as its extreme limit of indulgence, still a reasonable construction demands diligence on their part, and does not allow them to spend the whole time, when they know all the necessary facts, in coming to a conclusion whether or not they will attempt to avail themselves of its remedial provisions.

No good reason is assigned for not having the petition drawn, obtaining an order of notice thereon in vacation (R. S. c. 81, § 1), and entering and trying it at the March term, and thus save a year in taking it to the law court, instead of entering it on the nineteenth day of September term simply for notice, and trying it at the December term. For the clause in R. S. c. 64, § 25, providing that the "petition shall be heard at the next term after the filing thereof," is simply directory, limiting the time of delaying the hearing. But the real reasons are obvious. The niece had not then yielded to the "annoyances" of the nephew. Compromise was early the height of his expectation, and later of hers.

Delay, as an obstruction to a desirable early settlement of the estate, was deemed to be the most convincing argument for a compromise. An attorney was being sought, who, in direct violation of R. S. c. 122, § 12, would enter into the scheme and trust to success for his fees. Thus as early as March 3, the nephew wrote to his agent in Skowhegan: "It would seem to me that a good lawyer would take such a case as this and stand in for a share if he won the case;" adding, "All these big cases here (California), such as Lick, compromised, and this is probably what the lawyers would do in this." And on March 5 he wrote that a lawyer, formerly from Maine, "thinks there can be no doubt but a movement in that direction would bring them to a compromise at once." So, also, on August 24, the niece wrote: "What do you think of ——'s idea of forcing a compromise?" adding what we quoted above from her same letter in regard to the nephew's desire to have her sign "all the papers and help pay the expenses, if he fails to get a compromise." And although they did not succeed in finding a lawyer "who would take such a case as this and stand in for a share if he won," their fruitless search did not finally deter them from pursuing their main purpose.

Nor do we think that "justice requires a revision." For there can be no well grounded pretension that this instrument is other than the result of the deliberate, thoroughly matured and well settled purpose of the eminent man whose signature it bears, completing the line of donations begun years before his decease, showing full conversance with the magnitude of his own and of his brother's estates (the latter of which, under a power of attorney from its heirs, including the petitioners, he also managed during the last nine years of his life), and a full appreciation and knowledge of the condition and circumstances of his heirs. To be sure, the petitioners offered certain testimony tending to show that certain of his brothers "broke down mentally," and also his business affairs, with his manner of conducting them, so far as his books might disclose them—all as bearing upon his testamentary capacity—which the presid-

ing justice, in the exercise of his undoubted discretionary power to direct the course of the trial before him, temporarily declined to hear, apprising their counsel at the same time that he did not rule it to be incompetent, but would postpone it until some evidence of a more direct and substantial character should be introduced. But as no such testimony was introduced and the offer was not renewed, we conclude that that issue was abandoned, especially as the trial was taking place in the town where the testator had lived so many years, and where the nephew had stopped six months in 1883 and 1884, thus having not only personal knowledge of the testator's mental condition, but ample opportunities for sounding his townsmen on the subject. Hence, if a revision is to be granted under this head, it must be based upon some provision in the will which is unjust to the petitioner. But it is our opinion that none of its provisions are unjust to them.

The claim made in their petition is that if the will is allowed to stand it "practically and to a great extent disinherits his heirs." That is to say, her uncle gave one-half of his estate to charitable objects, in which he notoriously took a great interest during many of his latter years, and to her only her equal share of the remainder, save a few comparatively small bequests to some intimate friends. This disposition of his estate the law fully authorized, since the whole was his own; and they being collateral, and not lineal heirs, he was under no legal obligation to support them. (R. S. c. 24, § 16.) And knowing that she would receive her equal share of all his brother's estate, of the same magnitude as his own, we fail to perceive wherein any injustice is done to her by the will. The nephew's share of the testator's residue is bequeathed, to be sure, to him in trust for his son; but he inherits in his own right his equal share of all of Philander's; and it is quite apparent from the testimony why the testator made this discrimination, which may in the end show wisdom rather than any want of testamentary capacity, or any injustice to the nephew and his family. Neither new trials in equity nor reviews in

law, when not a matter of right, are granted, except upon the merits to prevent injustice. (Pom. Eq. § 836; *Brooks v. B. & M. L. R. R. Co.* 72 Maine, 365; *Jones v. Eaton*, 51 Maine, 387, and cases there cited.)

The provision of the statute (R. S. c. 63, § 25) has never before been before the law court, though like provisions have more or less frequently been construed in other jurisdictions and applied to a variety of circumstances, the courts declaring the provisions to be remedial in their character, in which view we fully concur. The language of the statute precludes the idea that leave is to be granted for the mere asking. But while it is remedial and wisely intended to practically extend the time for appealing to parties having meritorious cases, and who in good faith have shown reasonable diligence in availing themselves of the primary right of appeal as well as of the extended indulgence, still a liberal administration of it will not, through mere caprice, extend to parties an unwarranted license to negligently waste the time allotted them, either for taking an appeal or filing their petition for leave to appeal, for the purpose of delay, and thus, under a misnamed legal discretion, invite and uphold cases begun for pure compromise and speculation.

We are of opinion, therefore, that the decision of the presiding justice that the judge of probate had jurisdiction, and that justice does not require a revision of his decree, was correct.

The petitioners also allege that the will was not subscribed, as required by R. S. c. 74, § 1, by "three credible attesting witnesses, not beneficially interested under the will;" but that, on the contrary, they were not "credible," and were "beneficially interested under the will," inasmuch as they were tax-payers in the town of Skowhegan, to which a legacy was given and a devise made by the 15th and 16th items of the will.

"Credible witnesses, not beneficially interested under the will," are obviously intended to mean witnesses other than those described in St. 1821, c. 38, § 2, and in R. S. (1841)

c. 92, § 2, is simply "credible;" for all the words of description must have some meaning. We cannot impeach the intelligence of the law makers by considering the clause tautological.

It seems that the common law looked upon some persons as unworthy to obtain credit, and excluded them from being witnesses through fear that if heard, their testimony would be believed, and hence they were denominated not incredible witnesses, for that term the law applied to testimony, but incompetent witnesses—not entitled to the general character of credibility. While those who were free from infamy and certain other disqualifying taints and influences, including that of interest, the law trusted to testify, because of their general character of credibility, and called them competent. Hence "credible," as applied to witnesses, is universally considered to mean competent. But as "credible" witnesses are those free from interest, the clause "not beneficially interested under the will," was introduced for the purpose of eliminating the element of interest from the term credible, which formerly included it, and define and modify the interest which should thereafter disqualify one from subscribing a will. In other words, "credible" witnesses, as that term has hitherto been understood, were no longer essential; but witnesses who are competent in every respect other than that of interest, and so far as their interest should thereafter render them incompetent, it must not only be a "beneficial interest," but such as would be directly derived from or "under the will." Otherwise the utmost care and vigilance on the part of a testator, in selecting witnesses to his will, would fail and his will, since the omission of certain provisions of the statutes, soon to be mentioned, would be void, instead of saving the will at the expense of some provision in favor of the witness.

We think this view is fully warranted by a review of the statutes of wills, as follows: The first statute (St. 1821, c. 38) contained certain provisions, borrowed from the English statutes, making void any beneficial legacy, devise or inter-

est given or made to a subscribing witness, thereby rendering him a competent witness, and saving the remaining provisions of the will; and his competency was also restored by his receiving, releasing or refusing to accept, before testifying, any such interest given him by the will (§§ 8, 9 and 10). These provisions, in substance, were re-enacted in R. S. (1841) c. 92.

In 1856 the legislature made a total revolution in the common law governing the competency of witnesses so far as their personal interest was concerned, neither excusing nor excluding them by reason of interest as party or otherwise, with certain exceptions immaterial to our present inquiry, but provided that this statute should not affect the law relating to the attestation of wills (St. 1856, c. 266, §§ 1 and 3). Subsequently, but during the same year, the legislature commissioned Ex-Chief Justice Shepley to make a new revision of the statutes, and in his report, the provisions in St. 1821, c. 38, above mentioned, were intentionally omitted (as he said in a note to the chapter on wills) "as being superseded or inconsistent with recent enactments allowing persons interested to be witnesses" (Shep. Rep. 74, note c.). Whether this view was strictly correct or otherwise, those omitted provisions have never reappeared in any subsequent revision. So that, if a subscribing witness had given him by the will such an interest as was described in those omitted sections, and the same technical construction of the attestation clause were retained as formerly, not only the provision in the will in favor of the subscribing witness, but the whole will would be absolutely and irretrievably void. Hence, instead of liberalizing and enlarging, in the line of modern legislation, the law in regard to the making of wills, the legislation narrowed and restricted it, and introduced new obstructions which might readily escape the most prudent foresight. Perceiving this condition of things, the legislature, at its first session next after the revision of 1857 (from which those sections were first omitted) took effect, changed the attestation clause, by adding, "not beneficially interested under the provisions of

the will" (St. 1859, c. 120 § 1), with the evident intention of liberalizing the statute by declaring in substance that a subscribing witness is competent, whose interest a reading of the will does not show to be one which is vested by and given in the will, and not one which comes indirectly or consequentially by reason of an interest given to some person other than the witness. And this amendment, save the redundant words "the provisions of," has been re-enacted in the subsequent revisions.

A fair construction of the 15th item is that a specific sum of money is given to the town, to hold in trust, "for the worthy and unfortunate poor" resident therein; that the principal is "to be funded," and the income to be "expended," one moiety thereof by a "woman's aid society," and the other by the town. But the town is not authorized to use the latter moiety together with any sum which it may raise by taxation, as a joint fund for the support of its paupers; nor to assist such "worthy and unfortunate poor" only as have a settlement therein; but to distribute it among the residents described, regardless of any pauper settlement of the recipients. Moreover, the clause "to save them from pauperism," was not intended to mean, for the avowed purpose of preventing those who thus enjoyed his bounty from imminent legal pauperism, nor to qualify or in anywise limit or restrict the distribution to such persons as, without it, would necessarily or probably become a town charge; but it was simply intended to express, in the most general and abstract manner, the testator's belief of the good effects which might, in part, incidentally result from this considerate charitable bequest.

The devise also was for a public purpose, from which the inhabitants of the town might derive more or less benefit of a general character, but not of that direct, certain pecuniary nature which would thereby make them "beneficially interested." Such a devise cannot be reasonably expected to lessen the taxes of the inhabitants.

The land devised and the money bequeathed are to be held by the town as trustee for the respective purposes pre-

scribed in the will. They cannot be rightfully used for any other purposes. No execution issued on a judgment against the town can be levied on the land, since the nature of its tenure is disclosed by the record, to be read of all men. But if the mode of distributing the income of the bequest should sometimes incidentally happen to keep from public expense some of its recipients, and thereby indirectly affect the taxes in some slight degree, that fact would not render these witnesses incompetent. "It is clear," said Wilde, J., "that unless the witnesses are to be relieved from their taxes by this donation, they are competent. It is possible, though not probable, that they may thus be relieved, but neither possibilities nor even probabilities are sufficient to disqualify a witness." (*Hawes v. Humphrey*, 9 Pick. 350, 360; *Northampton v. Smith*, 11 Met. 390.)

In actions where a town is not a party to the record, but is simply indirectly interested, its inhabitants were at common law in this State competent, because their interest was contingent. (*State v. Stuart*, 23 Maine, 111, 114; *State v. Woodward*, 34 Maine, 293; *Fletcher v. Som. R. R. Co.* 74 Maine, 434).

But this question has been decided in principle in *Piper v. Moulton* (72 Maine, 155, 158), and is decisive of this branch of the case. One ground on which the decision was put was that the interest of two of the witnesses, though taxpayers in the town to which a bequest was made in trust, was not "certain and direct." The opinion was drawn, after thorough argument by learned counsel against the will, by the distinguished chief justice at that time, and it received the unqualified concurrence of our late learned associate, Judge Barrows, who for years before his twenty-one years' service on the Supreme Court bench, was judge of probate for Cumberland County. That opinion was announced and published nearly two years prior to the execution of this will. It was probably in the mind of Judge Dascomb, who wrote the will, when the testator came to execute it, and it afforded them the freshest assurance of this court that the friends and neighbors who had known

the testator so long and well, whom he desired to witness his solemn act of making a testamentary disposition of his vast possessions, one-half whereof he thereby devoted to charity's sake, although they were men of substance in the town which he had constituted trustee of some of his public bounty, were not thereby rendered incompetent therefor under our statute.

Furthermore, the petitioners contend that the witness Cushing, even if not disqualified by reason of being a taxpayer in Skowhegan, was "beneficially interested under the will," because, at the time of its execution, he held two shares of stock of the trading corporation called the "Skowhegan Hall Association," to which the testator bequeathed \$15,000, "in part to secure a liberal policy in respect to the use of the hall for objects of public interest."

The name of the corporation shows the object to have been to secure a public hall, and realizing that it would not at first be self-supporting, the block included stores, which would command good rents. The testimony shows that the hall was always used for "public meetings, temperance meetings, agricultural meetings, lyceum lectures, concerts, graduation exercises of high school, and town meetings, for which the custom was to charge rent, except for town meetings which was free in consideration of \$2,200 contributed by the town.

The obvious intention of the testator was to contribute the sum named toward making the hall free for all such "objects of public interest." The phrase "in part" could not have been intended as equivalent to "a part of." It in no wise indicated a desire or intention of devoting an undefined part of the bequest to securing a free use or "a liberal policy in respect to the use of the hall" for public objects, leaving the remainder to be appropriated for the pecuniary benefit of the stockholders. But when considered in connection with the charitable tenor of the will, together with the particular "objects of public interest" for which it had always been used, the clear meaning of the

testator was, that while, from knowledge derived during his long presidential tenure, he knew the sum alone bequeathed would not fully, but would "in part" at least, bring about the desired result; and that he thereby contributed what he considered to be his share of whatever sum might be found necessary thereto.

But no part of this legacy conferred on Cushing any direct and certain interest in it. The most that can be claimed is that the legacy gave an interest to a corporation two shares of whose stock—worth \$1.50 each—the witness, at the time of the execution, held but disposed of before the probate of the will.

Even if the theory of the petitioners be adopted—that a part of the legacy was to be appropriated to "securing a liberal policy in respect to the use of the hall for objects of public interest," Cushing's interest at best was contingent. The part to be thus applied not being designated in the will, the corporation might, by appropriating substantially the whole of it, deprive any stockholder of any beneficial interest whatever in it.

But we do not place the decision upon this ground, but upon the broader ground that the legislature did not intend to declare incompetent a subscribing witness to a will which contained a legacy to a corporation of whose stock the witness happened to hold one or more shares.

If a testator can give none of his estate to his town for charitable purposes, without thereby disqualifying as witnesses every one of his neighbors and townsmen who know him, and all other citizens of whatever town, county or State, who happen to own property in his town liable to taxation therein; or to a corporation, without thereby rendering incompetent every stockholder therein, then the practicability of legally executing a will—especially since the omission and consequent repeal of the former provisions herein before mentioned—becomes a matter of chance; for it would be substantially impracticable to seasonably ascertain such disqualifying facts.

On the other hand—to repeat what we have substan-

tially already said—we think the legislature intended, by its amendment of the attestation clause, to relieve wills from the dilemma in which the omission and consequent repeal of the early statutory provisions heretofore mentioned had placed them, and thereby enable a testator to readily know, from a perusal of the provisions of his will, whether or not he had therein given to those whom he desired to witness it a direct and certain interest in his estate; and if their names do not appear therein as devisee, legatee or donee of some direct and certain pecuniary interest named, and they are not heirs to any such devisee, legatee or donee—they shall be deemed not “beneficially interested under the will.”

Exceptions overruled.

PETERS, C. J., LIBBEY, FOSTER and HASKELL, JJ., concurred.

DANFORTH, J., did not sit.

See, also, *Stewart v. Harriman*, 1 Am. Prob. Rep. 95; *Drake's Appeal*, Id. 227; *Smalley v. Smalley*, Id. 566; *Hawkins v. Hawkins*, 2 Id. 491; *Piper v. Moulton*, Id. 574; *Giddings v. Turgeon*, 5 Id. 201; *Matter of Page*, Id. 557; *Dascomb v. Marston*, *next following*.

DASCOMB vs. MARSTON.

[80 Maine, 223.]

BEQUEST FOR CHARITABLE USES.

The legacy of a specified sum “the income only to be expended annually,” by the legatee, is an absolute legacy. A testator bequeathed two hundred thousand dollars to the American Baptist Home Mission Society; “one-half of which is to be applied in aid of freedmen's schools (other than the Wayland Seminary),”

and he also bequeathed fifty thousand dollars to the Wayland Seminary of Washington. *Held*, that the whole legacy, consisting of \$250,000, should be paid to the mission society, it appearing that the Wayland Seminary is a school established and maintained by said mission society.

A legacy to certain trustees, "to be appropriated at their discretion in founding a free public library," in a town named, is valid. A bequest to a town for the worthy and unfortunate poor, one-half of the income of the same to be expended by a woman's aid society formed for that purpose, is valid, whether such a society exists or not.

Bill in equity by the executors of the will of Abner Curnburn to obtain a construction of the following clauses in the will and codicil.

(Will.)

"Third. I give and bequeath to the Maine State College of Agriculture and Mechanic Arts, one hundred thousand dollars, the same to be funded, and the income only to be expended annually.

"Fourth. I give and bequeath to Colby University, two hundred and fifty thousand dollars, one hundred and seventy-five thousand dollars of which to be funded, and the income only to be expended annually.

"Fifth. I give and bequeath to the American Baptist Home Mission Society, two hundred thousand dollars, one-half of which to be applied in aid of Freedmen's schools (other than the Wayland Seminary).

"Sixth. I give and bequeath to the Wayland Seminary at Washington City, in memory of my deceased sister, Fidelia C. Brooks, late missionary to Africa, and Mary A. Howe, late teacher in the Seminary, fifty thousand dollars.

"Fourteenth. I give and bequeath to the trustees of Bloomfield Academy, to be appropriated at their discretion in founding a free public library in the town of Skowhegan, thirty thousand dollars. . . .

"Fifteenth. I give and bequeath to the town of Skowhegan, for the worthy and unfortunate poor, and to save them from pauperism, to be funded and one half of the income of the same to be expended by a Woman's Aid Society, formed for that purpose, twenty thousand dollars."

(Codicil.)

"First. Whereas in my said will I did give and bequeath to Colby University the sum of two hundred and fifty thousand dollars, now I do hereby revoke the said legacy, and do give and bequeath to the said Colby University the sum of two hundred thousand dollars, one hundred and fifty thousand dollars of which to be funded, and the income only to be expended annually.

"Second. And whereas by my said will I did give and bequeath to the Maine Insane Hospital the sum of one hundred thousand dollars, now I do hereby revoke said legacy and do give and bequeath to the said Insane Hospital the sum of fifty thousand dollars, the income only to be expended annually."

Edmund F. Webb and Appleton Webb, for the executors.

William T. Haines, for the Maine State College.

Walton & Walton, for Bloomfield Academy.

D. D. Stewart, for certain heirs and residuary legatees.

HASKELL, J. The executors of the will of Abner Coburn (*quod vide* 79 Maine, 25) ask a construction of that will. Most of the respondents have answered, and a general replication has been filed.

The bill does not call for answers on oath, and after replication they are not evidence of the facts stated in them. (*Clay v. Towle*, 78 Maine, 86.) After answer filed in an equity cause, the orator may elect to set the cause for hearing upon bill and answer, or traverse the truth of the answer by replication, thereby raising an issue of fact to be settled by evidence. If the cause be set for hearing upon bill and answer, the facts stated in the answer are to be taken as true, because the orator elects to so treat them; precisely as a plaintiff in an action at law, by demurrer to a defendant's plea, admits all the facts stated in it that are well pleaded.

In the cause before the court, the orators filed a replication to the respondent's answers, and thereafterwards moved to set the cause for hearing upon bill and answer only, and the motion was granted.

By filing the motion, the orators must be held to have waived their replication; otherwise the respondents can neither have the benefit of their answers as true, nor a chance to prove them true, and would be deprived of their defense. On motion, a replication may be withdrawn and the cause set for hearing upon bill and answer. (*Rogers v. Goore*, 17 Ves. 130; *Brown v. Ricketts*, 2 Johns. ch. 425. So for questioning the sufficiency of a plea. (*Green v. Harris*, 9 R. I. 401.)

I. The three several legacies of \$50,000 to the Maine Insane Hospital, "the income only to be expended annually;" of \$100,000 to the Maine State College of Agriculture and Mechanic Arts, "the same to be funded and the income only to be expended annually;" of \$200,000 to Colby University, "\$150,000 of which to be funded and the income only to be expended annually," are of like legal import and may, therefore, be considered together.

These donations are absolute, to enable each donee to compass certain specific objects within the scope and purpose of its charter, and incident to the beneficent design of its foundation. No other intent can be gathered from the will, and the intent of the testator therein expressed must govern. (*Turner v. Hollowell Savings Institution*, 76 Maine, 526.)

But if these legacies are treated as gifts of perpetual income, the result must be the same. A gift of the perpetual income of either real or personal estate is a gift of the property. That has always been the doctrine of this court. (*Andrews v. Boyd*, 5 Maine, 199; *Butterfield v. Haskins*, 33 Maine, 392; *Earl v. Rowe*, 35 Maine, 414; *Stone v. North*, 41 Maine, 265; *Sampson v. Randall*, 72 Maine, 109.)

Payment of these legacies to the donees will relieve the executors from further liability in the premises.

II. Two hundred thousand dollars is bequeathed to the

American Baptist Home Mission Society ("one-half of which to be applied in aid of freedmen's schools other than the Wayland Seminary"), and \$50,000 to the Wayland Seminary at Washington, D. C.

The case shows that the Mission Society is a New York corporation, chartered for "promotion of the preaching of the gospel in North America," with authority "to establish and maintain schools in connection with its missionary work among the colored population of the United States, now generally known as freedmen, . . . and for that purpose to take and hold necessary real estate, and receive, accumulate, and hold in trust endowment funds for the support of such schools;" that the society has established and is maintaining fourteen "freedmen's schools," one in each of thirteen formerly slaveholding States, and one, Wayland Seminary, in the District of Columbia.

The clear intention of the testator was that \$150,000 of this donation should be applied to the support of these and such other schools of the same class as the society may establish or see fit to patronize; but that \$50,000 of the same, and no more, should be applied to Wayland Seminary, one of these "freedmen's schools."

The mission society, therefore, takes the whole \$250,000, but \$150,000 it takes in trust for the support or aid of "freedmen's schools," according to the tenor of the legacy. To this society the whole legacy should be paid.

The society is authorized by its charter to take and hold the legacy, and its purpose is so manifestly charitable and meritorious that further consideration of it is unnecessary. (*Everett v. Carr*, 59 Maine, 325; *Simpson v. Welcome*, 72 Maine, 496; *Tappan v. Deblois*, 45 Maine, 122; *Drew v. Wakefield*, 54 Maine, 291.)

III. Thirty thousand dollars is bequeathed "to the trustees of Bloomfield Academy, to be appropriated at their on in founding a free public library in the town of Skowheg ."

This legacy is certain and specific and for a charitable purpose, and should be paid to the donees according

to its tenor. The authorities already cited establish its validity.

IV. Twenty thousand dollars is bequeathed "to the town of Skowhegan for the worthy and unfortunate poor, and to save them from pauperism, to be funded, and one-half of the income of the same to be expended by a Woman's Aid Society formed for that purpose."

A trust is created for the worthy and unfortunate poor. Clearly a charity. The direction that one-half the income shall be expended by a "Woman's Aid Society formed for that purpose" does not invalidate the legacy. Whether such society exists or shall be hereafter formed makes no difference. The beneficiaries are named. "For ye have the poor always with you."

A gift to a corporation not *in esse* for a charity is valid (*Swasey v. American Bible Society*, 57 Maine 523); *a fortiori* when the income only is to be expended under the direction of a society formed for that purpose.

The questions put by the heirs at law in their answer, and not already considered, have not been argued by their learned counsellor, and may therefore be considered as waived. (*State v. Craig*, 80 Maine, 85.)

Bill sustained. Decree below according to this opinion.

PETERS, C. J., WALTON, VIRGIN, LIBBEY and FOSTER, JJ., concurred.

See, also, *Marston*, petitioner, 229 *supra*; *Colton v. Colton*, 11 *supra*, and the note and cross-references thereunder.

PIERCE vs. STIDWORTHY.

[79 Maine, 234.]

BEQUEST OF "ALL THE RESIDUE" INCLUDES MONEY ALLOWED TO THE ADMINISTRATOR BY THE COURT OF COMMISSIONERS OF ALABAMA CLAIMS.

A testator who died in April, 1875, provided in his will "All the residue of my estate, real, personal and mixed, of which I shall die possessed, or which I may be entitled to at my decease, I give, devise and bequeath to my faithful wife Katharine A. Stidworthy for the term of her life, with the right and power to use and dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use if needed, any part of the principal of the personal property, making her sole judge of the need of so doing; and after her death I give and devise the same, or what shall then be left unapplied and unconsumed, to my children to be divided equally between them, the children of any deceased child to take the share of their parent; if all my children and grandchildren should die in the lifetime of my said wife, then I will that the property shall go and belong to her absolutely, to dispose of at her pleasure, and if she does not dispose of it by gift or otherwise in her lifetime to descend to her lawful heirs." *Held*, that a claim allowed the administrator with the will annexed, by the court of commissioners of Alabama claims, under the Act of Congress of June 5, 1882, passed by the will to the use of the widow; and that she was entitled to the custody of the fund arising therefrom upon giving bond to the judge of probate, with sureties, for the faithful management and preservation of the fund according to the terms of the will.

BILL in equity to obtain a construction of a will.

Lewis Pierce, pro se.

Woodman & Thompson, for the widow.

Nathan & Henry B. Cleaves, for the heirs.

LIBBEY, J. This is a bill in equity to obtain the true construction of the will of John Stidworthy, who died in April, 1875.

By the second clause in his will he gave small legacies to each of his children. The third clause is as follows: "All the residue of my estate, real, personal and mixed, of which I shall die possessed, or which I may be entitled to

at my decease, I give, devise and bequeath to my faithful wife, Katharine A. Stidworthy, for the term of her life, with the right and power to dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use if needed, any part of the principal of the personal property, making her sole judge of the need of so doing; and after her death I give and devise the same, or what may be left unapplied and unconsumed, to my children to be divided equally between them, the children of any deceased child to take the share of their parent; if all my children and grandchildren should die in the lifetime of my said wife, then I will it shall go and belong to her absolutely, to dispose of at her pleasure, and if she does not dispose of it by gift or otherwise during her lifetime, to descend to her lawful heirs."

In 1861 Stidworthy owned one half of the schooner *Arcade*, which was destroyed by the Confederate cruiser *Sumpter*, in November of that year. Under the Act of Congress of June 5, 1882, the complainant, as administrator with the will annexed, filed his application for the damage sustained by said Stidworthy by reason of the destruction of the schooner, before the Court of Commissioners of Alabama claims, re-established by said act, which awarded him, in his said capacity thereon, \$2,255.21, with interest, amounting in all to \$3,639.54, which was paid him September 1st, 1884. After settling his account in probate there remained in his hands \$2,595.52. Said Stidworthy left a widow and two daughters, named in his will, who are parties to this bill.

Two questions are propounded to the court.

1. "Is the widow of John Stidworthy entitled to the use of the above mentioned balance of money paid by the United States for the loss of his share of the schooner *Arcade*, or does it belong to his heirs?"

2. "If the widow is entitled to the benefit and use of said balance, is she entitled to its custody?"

By the third clause in the will of Stidworthy his intention is clearly expressed that all the residue of his estate,

both real and personal, of which he should die possessed, or which he might be entitled to at his decease should go to his wife "for the term of her life, with right and power to dispose of the income, rents, profits and interest of the same, and with further right to apply to her use any part of the principal of the personal property, making her the sole judge of the need of so doing." Under this clause all the residue of his property and rights, or claims to property, which he had the power to dispose of, by conveyance or assignment, passed to his widow to hold as therein specified.

In support of this conclusion, authorities need not be cited as the same question has just been decided by this court in *Grant, Appl. v. Bodwell* (78 Maine, 460). This case is unlike *Dunlap v. Dunlap* (74 Maine, 402).

This brings us to the question whether the damage sustained by Stidworthy by the destruction of the Arcade by the Sumpter, was a right or claim to personal property before it was recognized by the United States by the act of 1882, which was the subject of assignment by him. It was a claim for damage to property by a wrong doer and partook of the nature of the thing destroyed. The claim existed in equity and justice against some one as soon as the damage was sustained. True the testator had no legal claim which he could enforce against any one, because the claim had not been recognized by the government, but admitting responsibility for it and providing for its payment did not create it. It was a property right existing before. It was not a claim created by Congress, but its existence was admitted by it. It was a claim which would pass to the assignee in bankruptcy before it was recognized by Congress. It has long been so settled by the Supreme Court of the United States, *Comegys v. Vasse* (1 Pet. 193); *Erwin v. United States* (97 U. S. 392). It is so held in Massachusetts; *Leonard v. Nye* (125 Mass. 445); and so decided in this State in *Grant v. Bodwell (supra)*.

The question is so thoroughly and ably discussed by Mr. Justice Story in *Comegys v. Vasse*; and by Gray, C. J.,

in *Leonard v. Nye*, that an extended discussion of it here seems unnecessary.

If the claim existed and was assignable before it was recognized and provided for by Congress, it would certainly pass by devise as a claim to personal estate.

But it is claimed by the learned counsel for the heirs that sums allowed, awarded and paid, under the Act of Congress of June 5, 1882, were not in payment of any claims against the United States for damages done by the Confederate cruisers during the war of the rebellion, but mere donations or gratuities; that the sum of \$15,500,000 awarded against Great Britain by the Tribunal of Arbitration under the treaty of Washington, was awarded for damages done by the Confederate cruisers Alabama, Florida and Shenandoah and their tenders, and that the tribunal determined and adjudged that Great Britain was not responsible for the damages done by the other Confederate cruisers. While this is so the claims presented to the tribunal embraced the damages done by all the Confederate cruisers, and the tribunal awarded the gross sum of \$15,500,000 "for the satisfaction of all claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII, of the aforesaid treaty," and declared that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled," and the United States received that sum in full settlement and bar of all the claims submitted. The fund was then in the United States treasury, and it was exclusively within the power and discretion of Congress to determine how it should be distributed. By the act of June 23, 1874, Congress provided for the allowance and payment of claims for damages done by the Alabama, Florida and Shenandoah, and after all such claims were paid, it was found that a large part of said fund still remained in the treasury; and by the act of June 5, 1882, it provided for the allowance and payment out of said fund of claims for damages done by other Confederate cruisers during the late rebellion, "including vessels and cargoes attacked on the high seas," and therein prescribed the rules

by which the damages done to property should be measured. This act provides for the allowance and payment of claims for damages to *property* to the persons damaged, and only to the extent of their net damages, deducting what might have been received from other sources to be proved in the manner provided therein. Is it in the nature of a donation or gratuity to those who had no *claim*? or is it a recognition of claims for damages to property already existing? Upon this point we deem a quotation from the opinion of Mr. Justice Story in *Comegys v. Vasse* (*supra*), appropriate. In discussing the question whether the claim before it is admitted as a right to property, he says: "The theory, too, that indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation as contrasted with right, is not admissible." "The very ground of the treaty is, that the municipal remedy is inadequate, and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the law, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice." "It recognized an existing right to compensation in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity." And so in this case, the idea of a donation or gratuity is nowhere to be found in the act. The United States had the money in its treasury, which it had no equitable right to retain, and sought to distribute it to those justly entitled to it in payment of their claims for damages to their property.

The will giving the widow the use and income of the fund during her life, with the right to apply to her use, if needed, any part of the principal, making her the sole judge of the need of so doing, we are of opinion that she is entitled to the possession and management of it; but as she will be charged with the trust of managing and preserving it for the heirs who are to take what may be left at her

death as well as for herself, we think it but reasonable, under the peculiar circumstances of this case, that, before it is paid over to her, she be required to give a bond to the judge of probate in the sum of \$5,000 with sureties to be approved by him, conditioned for the faithful management and preservation of the fund according to the terms of the will.

The court answers the questions as follows :

1. The balance in the hands of the complainant as administrator passed to the widow by the third clause of the will.

2. The widow is entitled to its possession and management upon giving bond as herein required.

Bill sustained. Costs for complainant to be paid out of the estate. Decree in accordance with this opinion.

PETERS, C. J., WALTON, VIRGIN, FOSTER and HASKELL, JJ., concurred.

Of residuary bequests.—After-acquired personalty.—In *Comegys v. Vasse* (1 Peters, 198), cited in the principal case, the question was as to the assignability in bankruptcy of a claim against the Spanish government, to which the bankrupt as underwriter of a captured vessel had been subrogated; and while the decision turned upon the language of the federal statute of bankruptcy of 1800, the decision may well be considered an authority upon the question here involved. Referring to that statute Judge Story, in delivering the opinion of the court, said, "The fifth section declares that it shall be the duty of the commissioners, after the party has been declared a bankrupt, 'to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, &c., and also to take into their possession, and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt, and shall cause the same to be safely kept, until assignees shall be chosen or appointed.' These words are certainly very general and comprehensive. 'All the estate, real and personal, of every nature and description, in law or equity,' are broad enough to cover every description of vested right and interest attached to, and growing out of property. Under such words, the whole property of a testator would pass to his devisee; whatever the administrator would take in case of intestacy, would seem capable of passing by such words. It will not admit of question, that the rights devolved upon Vasse by the abandonment would, in case of his death, have passed to

his personal representative, and, when money was received, be distributable as assets. Why, then, should it not be assets in the hands of the assignees?"

In *Grant v. Bodwell* (78 Me. 460), it appeared that a Mrs. Cables in her lifetime had lost by a Confederate cruiser a part of the brig "Joseph," and under the act of congress touching the Alabama claims, her administrator recovered on account of that brig the money in question in that case. The claimant's sole heir was Mrs. Prescott, who died testate leaving to her son "all the residue and remainder of my estate, real, personal and mixed, wherever found and however situated." It was held that this passed to her son the sum recovered from the Alabama claim by the claimant's administrator and distributed to the executor of the testatrix; that he recovered it in satisfaction of a loss that she had suffered, and not as a gratuity or bounty given to her living kindred (citing, *Comegys v. Vasse*, 1 Peters, 193, 215, 217; *Erwin v. United States*, 97 U. S. 392; *Phelps v. McDonald*, 99 U. S. 298, 304; *Bachman v. Lawson*, 109 U. S. 659; *Leonard v. Nye*, 125 Mass. 455). "Although collected after her death," said Haskell, J., "it was in satisfaction of a loss that she had sustained, and in payment of it. She could not recover it in her lifetime, but her right to recover it was a constituent part of her estate and vested in her administrator at her death, and is to be distributed as personal estate (citing *Thurston, Administrator v. Lowder, Administrator*, 40 Me. 197). . . . It is unlike the case of *Blaisdell v. Hight* (69 Me. 306), where the language used was held insufficient to pass certain after-acquired real estate, or the case of *Dunlap v. Dunlap* (74 Me. 402), where the testator made a schedule of his property, and devised the residue, after certain legacies, to a niece."

In *Leonard v. Nye* (125 Mass. 455), in which Chief Justice Gray delivered the able opinion referred to in the principal case, it was said that a similar claim of an owner of a cargo destroyed by a cruiser of the Confederate States, was "capable of passing by an assignment from him in any form recognized by law, though made after the destruction of the property and before the award of indemnity."

In *Erwin v. United States* (97 U. S. 392) it was held that where cotton was captured by the federal military forces and sold, and the proceeds were paid into the treasury of the United States, the owner's claim against the government constitutes a property right which passes to his assignee in bankruptcy, notwithstanding a bar to its judicial enforcement arising from lapse of time. Justice Field in this case declared the rule to be that "Demands against the government, if based on considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the legislature." So, also, in *Thurston v. Lowder*

(40 Me. 197), it was held that an award made under a treaty with the Mexican government for a vessel which had been destroyed constituted a part of the owner's estate, although the treaty which made the collection of the claim possible was entered into long after his death. See, generally, as to residuary devises and legacies, Beach on Wills, § 262, and as to after-acquired realty, Id. § 83.

TOMLINSON vs. BURY.

[145 Massachusetts, 346.]

SPECIFIC LEGACIES.—“BANK STOCK.”—CONTRIBUTION.

A bequest of the testator's "bank stock" is to be construed as describing deposits in savings banks owned by the testator, if he owns no shares of stock in a bank. A bequest of "all the mill stock and bank stock remaining in my name after the decease of my said wife" is specific, and not general. If shares of stock, specifically bequeathed by a will, are appropriated to satisfy the claims of the testator's widow, who has waived the provisions of the will in her favor, the legatee is entitled to contribution from other legatees under the will.

BILL in equity, by certain legatees under the will of John Tomlinson, to obtain contribution from other beneficiaries under said will. At the hearing in the Superior Court, a decree was ordered for the plaintiffs; and the defendants appealed to this court. The facts appear in the opinion.

M. Reed, for the defendants.

J. M. Morton and *A. J. Jennings*, for the plaintiffs.

DEVENS, J. The parties litigant have agreed, if the plaintiffs, whose legacy has been appropriated to the claims of the widow, are entitled to contribution from other legatees, as to the amount to which contribution shall be made, and also as to the proportions in which it shall be distrib-

uted. This leaves open as the only question for discussion whether they are thus entitled. This depends apparently upon the inquiry whether the legacy to them is to be held as specific or general. The rule is well settled that, if a legacy is specific, and is appropriated to the payment of debts, the legatee (if the general or residuary legacies are not sufficient) is entitled to contribution from the holders of other specific legacies. (*Farnum v. Bascom*, 122 Mass. 282.) Nor is there any distinction between such a case and one where a specific legacy is appropriated to satisfy the lawful claims of the widow of the testator, who has waived the provisions of the will made in her favor. To the extent to which a specific legacy has been taken by the widow, the legatee would be entitled to contribution, as much as if it had been taken for the payment of debts. It is equally well settled that, if the claim for contribution of the plaintiffs rested upon the fact that they were residuary legatees, it could not be maintained. Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied. (*Richardson v. Hall*, 124 Mass. 228, 233.)

The gift to the plaintiffs by the fourth clause of the testator's will was "all the mill stock and bank stock remaining in my name after the decease of my said wife." The plaintiffs were also residuary legatees and devisees under the sixth clause of the will, but they make, and could make, no claim on that account to any contribution. The words "bank stock" are to be construed as describing the testator's deposits in various savings banks. He had no shares of the capital stock of any bank, nor any other property in banking associations, and, while the expression is not accurate, it must be held, under these circumstances, to describe these deposits. The question is not of importance in the case at bar, as, if there is a specific legacy of the "mill stock," which has been taken, the plaintiff would be entitled to contribution from the other legatees, and the amount has been agreed upon. Specific legacies are held to contribute proportionally to the charges on the estate,

unless from the expressions of the will, or from the position of the legatee, as where he receives a legacy in lieu of a debt or claim against the estate, it is seen that such legacy is entitled to a preference. (*Farnum v. Bascom*, *ubi supra*.) There is a presumption of intended equality between general legatees as a class, and between specific legatees as a class. A specific legacy is one which separates and distinguishes the property bequeathed from the other property of the testator, so that it can be identified. It can only be satisfied by the thing bequeathed; if that has no existence, when the bequest would otherwise become operative, the legacy has no effect. If the testator subsequently parts with the property, even if he exchanges it for other property or purchases other property with the proceeds, the legatee has no claim on the estate for the value of his legacy. The legacy is adeemed by the act of the testator. Tried by these tests, the legacy of the testator's "mill stock and bank stock" must be held specific. It could only be satisfied by this mill and bank stock, and if the testator had disposed of them, or any part of them, to that extent the legacy would have been adeemed.

Nor, in considering whether the legacy is specific, is it important that it was of such of these stocks as remained after the decease of his wife. He had bequeathed to her "the use, improvement, and income, of all" his estate, real and personal; he may have anticipated that it might suffer some diminution during her life, but, whether he did so anticipate or not, the subject of the gift was distinctly defined.

The defendants contend that this case comes within a class of cases where it has been held that a gift of all a testator's personal estate, enumerating the various classes, has been held to be general, and not specific. (*Hays v. Jackson*, 7 Mass. 149; *Howe v. Dartmouth*, 7 Ves. 137; *Brummel v. Prothero*, 3 Ves. 111; *Walker's Estate*, 3 Rawle, 229; *Woodworth's Estate*, 31 Cal. 595.) But the reason why it has been thus held is that in those cases no intent was shown to give a distinct part of the estate, nor to separate

a portion thereof from the residue, but rather an intent to give the whole. A bequest is not the less specific because it includes numerous articles. A bequest of all the horses which the testator may own, of all his plate, of all the books in his library, or of all the horses, cattle, and farming tools on a particular farm or farms, is specific. (*Stephenson v. Dawson*, 3 Beav. 342; *Borden v. Jenks*, 140 Mass. 562.)

In the case at bar, the mill and bank stock were, by the bequest, separated and distinguished from the testator's other personal property.

Decree affirmed.

See, also, *Clark v. Atkins*, 4 Am. Prob. Rep. 97; *Maybury v. Grady*, 3 Id. 875; *Riggs v. Cragg*, Id. 391; *Metcalf v. First Parish in Framingham*, 1 Id. 11; *Emery v. Batchelor*, 5 Id. 877.

MIFFLIN'S APPEAL.

[121 Pennsylvania State, 205.]

THE RULE AGAINST PERPETUITIES.

A gift to a life tenant of an estate in land destructible in the life time of such life tenant does not, even though the power be unexercised, infringe the rule against perpetuities.

APPEAL from a decree of the Court of Common Pleas of Philadelphia County. The facts appear in the opinion.

A. T. Freedley and *William Henry Rawle* (*R. Mason Lyle* was with them), for the appellant.

J. B. Townsend and *George W. Biddle*, for the appellees.

GREEN, J. If the element of indestructibility of the estate of the person who, for the time being, is entitled to the property subject to the future limitation, is an essential in the definition of a perpetuity, the decision of the court below is right. In at least two instances, this court has approved a definition which does include that element. Thus, in *Hillyard v. Miller* (10 Pa. 334), Chief Justice Gibson said: "A perfect definition of a perpetuity has not been given, and the nearest approach to it is found in Lewis on Perpetuities, ch. 12, where it is said to be a future limitation, whether executory or by way of remainder, and of real or personal property which is not to vest till after the expiration of, or which will not necessarily vest within, the period prescribed by law for the creation of future estates, and which is not destructible by the person for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event." The same judge in the same opinion said: "It was the indestructibility not only of springing and shifting cases (uses?) and of executory devises, but also of future trusts, which forced upon the judges the rule against perpetuities, in order to set bounds to the remoteness of not only legal, but equitable limitations; and it acts upon perpetuities wherever they appear, except in conveyances in mortmain or to charitable uses." In *Smith's Appeal* (88 Pa. 495), the foregoing extract, containing the definition by Lewis, was repeated by our Brother Paxton in the course of the opinion which was delivered by him.

In the definition given by other text writers the same idea is expressed. Gray, in his work on the rule against perpetuities, in sections 140 and those which follow, clearly points out that a perpetuity is an indestructible and inalienable interest in its original sense; and, while he shows that it has another or artificial meaning, to wit, that "it is an interest which will not vest till a remote period," yet in all his illustrations he shows that interests which were destructible were not perpetuities. At § 203 he says: "Thus

a future interest, if destructible at the mere pleasure of the present owner of the property, is not regarded as an interest at all, and the rule does not concern itself with it. For instance, limitations after an estate tail are never too remote; the present tenant in tail can destroy them all at any moment by docking the entail." Again, at § 443, he says: "A future estate which at all times until it vests is in the control of the owner of the preceding estate, is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the rule against perpetuities." Under the head of Powers, at § 477 he says: "A power given to the unborn child of a living person is too remote; that is, if it is a power to be exercised by will only, or a special power to be exercised by deed. But if such unborn child has a general power to appoint by deed, he has the absolute control exactly as if he had the fee, since he can at once appoint to himself. Such general power to appoint by deed is therefore not obnoxious to the rule against perpetuities;" citing *Bray v. Hammersley* (3 Sim. 513). Again, at § 524: "If property is given to A. for life with power to appoint it by deed or will to whom he pleases, he has the absolute control over it. There is in truth no future interest; the life tenant can deal with the property as if he owned it in fee. Therefore, in the execution of such a power, the remoteness of an appointment under it is to be judged from the point of time of its exercise, and not from the time of its creation;" citing a number of authorities.

Mr. Lewis in his work on Perpetuities, on p. 483, says: "The great aim of the law against remoteness is secured in the immediate and unrestrained alienability of the property by means of the power." Farwell on Powers (p. 226) says: "The rules against perpetuities apply to instruments executing powers, as well as to other instruments; but there is an important distinction between general and particular powers in this respect. The donee of a general power is virtually the absolute owner of the property on which his power extends, and he is regarded as absolute owner for the purpose of considering the application of the

rule against perpetuities to him." In Gray's work, at section 526 *b*, the author says: "And if a man who has a vested limited interest in property has the present unconditioned right to turn that limited interest into an absolute interest, and thus to acquire the present unconditioned absolute interest, he is regarded by the rule against perpetuities as already having such interest. A tenant in tail is such a person; a life tenant with a general power exercisable by deed is also such a person. To this extent the rule sacrifices form to substance, but the substance must be there. There must be a person with a vested limited interest who has the immediate right to become the present absolute owner. Such is not the case when a life tenant has a power which he can exercise only by will. The general rule must govern unless the exception is made out, and the exception is not made out unless there be a present right to acquire the present absolute interest."

In Lewis on Perpetuities, at page 484, the author speaking of general powers says: "Of this kind is a limitation of property to such uses or upon such trusts as A. shall appoint, and subject to any appointment to A. in fee, or to B. in fee, or to any other person or succession of persons for life, in tail, in fee, or otherwise. In such cases, as the power is so general and absolute as to be equivalent, for the purposes of alienation, to the ownership in fee simple, an appointment under it, so far as concerns the proper period for the vesting of the interests thereby conferred, rests on the same footing with an original conveyance. Nor is there any greater tendency to a perpetuity in a general power of appointment over property, and the possibility of the exercise of such power in opposition to the laws of remoteness, than in a simple absolute right of ownership. The general power authorizes as complete and as immediate a disposition of the property as could be effected were the donee entitled to the fee or absolute interest; and it is of course clear that such a power may be exercised by the donee in favor of himself. And, as regards the estate limited in default of appointment, when not given to the do-

nee of the power, there can be no necessity to consider how far a perpetuity may be created ; because, although that estate may be defeated at any time by an exercise of the power, yet the great aim of the laws against remoteness is secured in the immediate and unrestrained alienability of the property by means of the power. It may be true that any alienation of the property must be merely and simply by virtue of the power, and that the exercise of such power must take effect by reference to the deed or will creating it, and, so far, a necessity may seem to exist, for restricting the donee to the appointment of interests which would have been good if limited in the original will or settlement ; but if the essence of a perpetuity be wanting in the nature of the power, or rather if the scope and spirit of the power be directly adverse to a perpetuity, it seems too much to argue that it will not authorize limitations which might have been created by a person having the absolute dominion, *i. e.*, such limitations as will necessarily vest within lives in being and twenty-one years, computed from the time at which they are raised."

The foregoing views are undoubtedly correct ; they are not at all impeached by text writers or decisions. In our opinion they control this case. As a matter of course, if Mrs. Mifflin had actually executed the power of sale and caused the title to be conveyed to herself in fee simple, as she had the plain right to do, the limitations of her will would have to be determined upon their own merits, regarding her as the owner in fee and disregarding the previous state of the title. But so far as the application of the rule against perpetuities is concerned, the situation is precisely the same as if she had executed the power. For the question is, whether the provisions of the original deeds of 1813 and 1816 are inoperative because of the rule against perpetuities. They are, if they create inalienable and indestructible estates, to continue longer than the prohibited period. But the estate of Mrs. Mifflin was neither inalienable nor indestructible. It was destructible by her own act. It was entirely within her power to become the owner in

fee simple of the estates granted and to totally defeat any ulterior limitations. It proves nothing to say she did not exercise her power and that therefore the situation is the same as though she never had the power. For certain purposes and in certain cases that, of course, is true. But in considering merely the application of the rule against perpetuities, it is not true, because that rule requires that the estates in question should be indestructible, and an estate which can be destroyed by the person who holds it for the time being is not indestructible.

We do not think it necessary to follow the learned counsel on both sides, through the very able and interesting discussions contained in their paper books. We will say, however, that *Smith's Appeal* (88 Pa. 492), does not control this case. Mrs. Smith had only a limited power of appointment by will, which, of course, could only operate after her death. She could in no manner acquire the title herself, and her estate was an indestructible one, whereas Mrs. Mifflin's estate was destructible beyond all question. In our opinion the learned court below was right in the view taken of Mrs. Mifflin's estate and therefore

The decree is affirmed, and appeal dismissed at the costs of the appellant.

See, also, *Simpson v. Cook*, 1 Am. Prob. Rep. 27; *Slade v. Patten*, Id. 346; *Robert v. Corning*, 3 Id. 178; *Bates v. Bates*, Id. 212; *Fite v. Beasley*, 4 Id. 274; *Kent v. Dunham*, 5 Id. 14; *Farnam v. Farnam*, Id. 103; *Wheeler v. Fellowes*, 5 Id. 76; *Webster v. Morris*, Id. 158.

STOCKBRIDGE, PETITIONER.

[145 Massachusetts, 517].

PRESUMPTION OF DEATH.—ABSENCE OF THE LEGATEE.

A man left his wife and family in August, 1871, to seek work. His wife heard from him only twice after he left, the last time being about three weeks after so leaving, and she never heard from him again, though she made inquiries. At

the time he left his health was "fair," although he was then "drinking hard," and had been for some years. *Held*, that these facts were sufficient to raise a presumption of fact that he died before June 21, 1881.

PETITION to the judge of probate, by the three children of David H. Stockbridge, one of said children being a minor, alleging that said David H. was named as a legatee under the will of Elam Stockbridge, whose will had been duly proved and allowed; that David H. died before said Elam; that the legacy, amounting to \$1,521.60, had, by a decree of the Probate Court, been ordered to be deposited in the Springfield Institution for Savings; and that the petitioners were entitled to the same.

The judge of probate dismissed the petition; and the petitioners appealed to this court.

The case was heard before W. Allen, J., who reported the case for the consideration of the full court, in substance as follows:

Elam Stockbridge died on June 21, 1881. His will was dated December 19, 1873, and the last of several codicils, each of which expressly ratified and confirmed the will, except so far as changed by the codicils, was dated June 19, 1879. These instruments were duly admitted to probate. By the third clause of his will, he directed his executors to divide all the remainder of his estate into nine parts. One of these nine parts he directed to be divided into five parts, and one of these five parts he directed his executors "to divide equally among the children of Chester Stockbridge." In another part of the will, the testator described Chester Stockbridge as "son of my brother David."

The estate of Elam Stockbridge has been settled by the executors, and the residuary legacies have become payable.

The executors of the will of Elam Stockbridge filed a petition in the Probate Court, on which no notice was ordered, representing that a certain sum was due David H. Stockbridge as a legatee under said will, and that his place of residence was unknown; and praying that the sum might be ordered to be deposited or invested, according to the

provisions of the St. of 1885, c. 376. On March 17, 1886, the judge of probate passed an order, which, after reciting the petition, proceeded as follows: "It appearing that the residence of said David H. Stockbridge is unknown, said executors are hereby ordered to deposit said sum in the Springfield Institution for Savings, in the name of the judge of said court, for the time being, to accumulate for the benefit of said legatee, and said executors are further ordered to file in said court a memorandum of such deposit, with the original certificates or other evidence of title thereto." The executors deposit the money accordingly.

David H. Stockbridge is the son of said Chester Stockbridge; the petitioners are the only children of said David H., and were his only issue living at the decease of the testator. Neither said David H. nor the petitioners are named in the will, or take anything under it, unless under a legacy to children of Chester Stockbridge.

The petitioners, to prove that David H. Stockbridge died before the testator, offered the deposition of the wife of said David H., in which she testified that she and David H. were married on September 10, 1857; that she last saw him on August 17, 1871, at Princeton, Illinois; that at that time they were living together as man and wife; that they then had three children, William R., twelve years old, Hattie L., eleven years old, and Mary G., one year old; that the family had no means of support other than those provided by said David; that David was out of work and could get none; that he was offered work on the construction of a new railroad in Michigan, and accepted it; that the railroad was to run from Houghton, Michigan, to Chicago; that he and others left to go to Michigan and work on that job; that he said he should go to Houghton; that after he left his home she received two letters from him, the first dated at Chicago, Illinois, and the last at Milwaukee, Wisconsin; that the first was received about two days after he left, and the last about three weeks after he left; that she had not heard from him since that last letter; that he was forty-one years old on August 28, 1871, the month he left home; that she

had written to him at Houghton, Michigan, and also to the postmaster at that place; that his brother, Frank W., had made all the effort he could to find his whereabouts; that she had inquired of persons who left with him; and that the condition of his health when he left home was fair; but he was drinking very hard, and had been for some years before he left home.

C. L. Long, for the petitioners.

C. ALLEN, J. Assuming that the statements contained in the deposition were true, they are sufficient, in the absence of anything to the contrary, to raise a presumption of fact that David H. Stockbridge died before the testator. The rule is certainly stated in *Loring v. Steineman* (1 Met. 204, 211), by Chief Justice Shaw: "Upon a person's leaving his usual home and place of residence for temporary purposes of business or pleasure, and not being heard of, or known to be living, for the term of seven years, the presumption of life then ceases, and that of his death arises. But this presumption may be rebutted by counter evidence, or by a conflicting presumption." And in *Prudential Assur. Co. v. Edmonds* (2 App. Cas. 487, 509), it was stated by Lord Blackburn to be "necessary, in order to raise the presumption, that there should have been an inquiry and search made for the man among those who, if he was alive, would be likely to hear of him." (See, also, *Flynn v. Coffee*, 12 Allen, 133; *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87, 96; *Bowditch v. Jordan*, 131 Mass. 321; *In re Phené's Trusts*, L. R. 5 Ch. 139; *In re Lewes' Trusts*, L. R. 6 Ch. 356; 1 Greenl. Ev. § 41; 1 Taylor Ev. § 200.) It should therefore now be taken for granted that David H. Stockbridge died before the testator; and by virtue of the Gen. Sts. c. 92, § 28, re-enacted in the Pub. Sts. c. 127, § 23, his issue who survived the testator are entitled to take what he would have taken had he survived the testator. The circumstance that the gift to him was only as one of a class does not prevent the operation of this statute. (*Moore v. Weaver*, 16

Gray, 305.) The fact that David H. Stockbridge was a nephew of the testator is found in the will. It does not appear, nor in the view which we have taken is it material, whether any children of Chester Stockbridge survived the testator; that fact, if it existed, would not cut off the right of the children of David H. Stockbridge; it would only diminish the amount to which they would be entitled.

The executors of the will of Elam Stockbridge deposited the money in the Springfield Institution for Savings, by virtue of an order of the judge of probate, passed in pursuance of the St. of 1885, c. 376, it being recited that it appeared to him that the residence of David H. Stockbridge was unknown. This, however, was not intended to have any further effect than to provide for the proper keeping of the money, with its accumulations, until it should be ascertained and determined who are properly entitled to receive the same. It now appears that the petitioners are so entitled; and an order may be framed for the payment of two-thirds of the amount to the two petitioners who are *sui juris*, and of one third to the guardian of Mary G. Stockbridge, a minor, when such guardian shall be duly appointed.

Decree accordingly.

BURNHAM vs. COMFORT.

[108 New York, 535.]

THE RULE OF ADEMPTION NOT APPLICABLE TO DEVISES OF REALTY.

The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty. A specific devise of real estate can only be revoked by the destruction of the will or the execution of another will or codicil, or by an alienation of the estate during the testator's life.

VOL. VI.—18

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department. The opinion states the case.

Gabriel L. Smith, for the appellant.

J. A. Reynolds, for the respondent.

GRAY, J. The appellant contends that a devise of real property to the respondent was satisfied by the payment to her in the testator's, her father's, lifetime, of a sum of money, and for which she gave a writing in the following form :

"Received of Oliver Comfort \$500, which money I receive as my part of my father's estate up to this time, and all such other property as he may accumulate up to his decease. In witness whereof I have hereunto subscribed my name."

"Dated Southport, May 14, 1864," and signed "Harriet Burnham, in presence of Lawrence Lain."

By testator's will, made prior to that date, he had devised to his brother certain lands for life, and after his death to this daughter. His residuary estate testator gave to his son Oliver, this appellant. Testator died some fifteen years after the receipt was taken from his daughter, and there is no evidence of any revocation or alteration of his will, or of any part thereof, having been made by other will or codicil, or instrument executed with the formalities of a will. It was found as a fact below, and it is conceded here, that this payment by testator to his daughter was intended to be in lieu of the devise to her in the will, and that it was so accepted by her at the time.

The question is thus squarely presented whether a satisfaction of the devise in the will to the daughter was effected. If we should hold that such was the effect of the transaction between the father and daughter, we must hold that it operated as a revocation of the will to the extent of the provisions affecting the daughter's estate thereunder. We think such a proposition to contravene the spirit, if not

the letter, of the provisions of the Revised Statutes of this State applicable to wills, and that it lacks support in principle as it does in authority.

The rule of ademption is predicable of legacies of personal estate and is not applicable to devises of realty. (Story's Eq. Jur. § 1111; 2 Williams on Exrs. [5th Am. ed.] 1202; 1 Roper on Legacies, 365; *Davys v. Boucher*, 3 Young & Coll. Eq. Rep. 397; *Langdon v. Astor's Exrs.*, etc. 16 N. Y. 34.) Ademption is the extinction or satisfaction of a legacy by some act of a testator, which is equivalent to a revocation of the bequest or indicates the intention to revoke, and the rule is applied where the testator is a parent of the legatee or stands *in loco parentis*. The question of its application is made to depend upon the declared or presumed intention of the donor. (*Langdon v. Astor's Exrs.*, *supra*.) The danger of creating an intention from the facts is ordinarily great enough to require in each case that the mind of the court should be wholly satisfied as to the meaning of the testator's act. In the present case, had the testamentary gift been a legacy of personal property, we should say that no doubt could exist as to what was intended by testator at the time of the transaction. We see no reason, however, for the application of any such rule to devises of real property. During a testator's lifetime his will is, of course, inoperative and ineffectual, and only upon his death does it have any legal operation. The writing which testator took from his daughter, was not an agreement in any sense binding upon him, nor was it one which inured to appellant's benefit. Appellant was no party to it, and no consideration moved from him for its execution. The question is not such as would arise by reason of a transaction between the respondent, as the legatee, and appellant, as the residuary legatee, by which she had transferred or released to him her interest under her father's will in due form. After the writing had been delivered the daughter may have been precluded from asserting her right to recognition in her father's will, but the father was at liberty either to give legal effect to the transaction by changing his will and revoking

the provisions in his daughter's favor, or to reconsider any previously existing intention of altering his provision for her. Although he survived the transaction fifteen years, he did not change his will, and the presumption of a subsequent change of intention, on his part, from any motive, may be entertained without doing any violence to our ideas of strict justice.

But a deeper principle underlies the consideration of this question in the effect to be given to our statutes governing the making of wills. A specific devise of real property may be revoked by alteration or alienation of the estate during testator's life (*Livingston v. Livingston*, 3 Johns. Ch. Rep. 154; *McNaughton v. McNaughton*, 34 N. Y. 201); but we fail to see any other mode of effecting such revocation without running counter to those provisions of the statutes which declare what acts shall revoke or alter a will in writing. (3 R. S. [Banks, 7th ed.] 2286, 2288.) Those provisions do not contemplate a revocation or alteration of any part of a will, or of any previous devise, except by some other will in writing, or some writing of the testator declaring such revocation or alteration, and executed with the same formalities with which a will is required to be executed. (§ 42.) And they do contemplate a revocation of a devise of property, previously devised by testator, to be operated, where the testator's interest in such property has been altered, but not wholly divested, by some conveyance, settlement, deed or other act of the testator, only when the instrument, by which the alteration of testator's interest is made, declares the intention that it shall operate as a revocation of such previous devise, or its provisions are wholly inconsistent with the terms and nature of such previous devise. (§§ 47, 48.) Thus the statute explicitly declares that where a will is not wholly or in part revoked or altered by some other will or writing executed with like formalities, a previous devise of property is only to be deemed revoked by some alteration of testator's interest in the property devised, evidenced by some conveyance or instrument either declaring the alteration to be

a revocation or wholly inconsistent with the nature of the previous devise.

In these provisions I think I see ample reason for refusing our sanction to the introduction of a doctrine, which, while if applicable at this day to legacies of personal property, can work no special prejudice to rights of property in such application, yet in its application to devises of real property might work great mischief and tend to endanger the safety of titles which depend for their security upon the conduit of a testamentary devise. The reason for refusing to extend the application of the principle of satisfaction to devises of real estate, which was assigned in the case *Daveys v. Boucher* (3 Young & Collier Eq. Rep. 397), was that to so extend it would repeal that provision of the statute of frauds which applies to the revocation of wills of real estate.

The sixth section of the English Statute of Frauds (29 Car. chap. 2, § 3), provided that devises in writing of lands, etc., should be revocable by some other will, or codicil, or writing declaring the same, or by destruction by testator's act; and that all such devises should remain in force unless so destroyed, or unless altered as mentioned, by will, codicil or writing, witnessed in form. The subsequent passage of chapter 26 of 2d Victoria, placed the revocation of wills of personalty upon the same footing as wills of realty. (1 Wms. on Exrs. 106, 107, 130, 131.) There is a sufficient likeness in the English statute to ours to make the reasoning applicable here.

A rule of law which has heretofore been sanctioned and relied upon, which is in unison with the spirit and with the sense of our statute, and which offers a safe rule of property, is rather to be followed than to be departed from for reasons moving from the circumstances of a particular case. Reference to adjudged cases in the courts of other States only serves to confirm us in the views we have expressed. (*Clark v. Jetton*, 5 Sneed, 229; *Allen v. Allen*, 13 So. Car. 512; *Weston v. Johnson*, 48 Ind. 1.)

The judgment should be affirmed.

All concur except EARL and PECKHAM, JJ., dissenting.
Judgment affirmed.

Whether the doctrine of ademption by advancement is applicable to devises of realty.—Among the exceptions to the doctrine of ademption by advancement, Roper, in his work on Legacies, includes cases in which the legacy or devise and the advancement are not the same in kind. *Clendenen v. Clymer*, 17 Ind. 155; *Allen v. Allen*, 18 S. C. 512; 36 Am. Rep. 716; *Benjamin v. Dimmick*, 4 Redf. 7; 1 Roper on Legacies, 375.

For example, a devise of real estate is not to be considered as adeemed by an advancement in money (*Allen v. Allen*, 18 S. C. 512; 36 Am. Rep. 716; *Evans v. Beaumont*, 4 Lea. 599); neither is an interest in a business an ademption of a legacy in money, without clear proof in both cases that they were so intended by the testator. *Holmes v. Holmes*, 1 Bro. C. C. 555.

And the principal case might well have been decided upon this ground; for while there are many authorities in support of the position therein taken that the doctrine of ademption does not apply to devises of realty (1 Roper on Legacies, 379, 380; citing *Davys v. Boucher*, 3 Younge & C. 397; *Burnham v. Comfort*, 27 Hun, 216; *Clark v. Jetton*, 5 Sneed, 229, 236; *Redfield on Wills*, 441; *Williams' Ex'rs*, 5th Am. ed. 1202. See, however, *Williams v. Bolton*, 1 Dick. 405; *Lechmere v. Carlisle*, 8 P. Wms. 211; *Wilcocks v. Wilcocks*, 2 Vern. pt. 2, 528; *Willard's Ex'rs*, 351); its soundness was ably questioned in the dissenting opinion of Follett, J., in the court below. 37 Hun, 216, 220. So also in *Thomas v. Capps* (5 Bush, 273), while a certain conveyance of lands was held not to satisfy the devise in question, the court nevertheless distinctly recognized the applicability of the doctrine that a devise of real estate may be subsequently satisfied. And several of the cases usually cited to sustain the position of the principal case will be found upon examination to be obscure, as *Weston v. Johnson*, 48 Ind. 1; or to relate to legacies and not at all to devises, as *Swope's Appeal*, 27 Pa. St. 58; or to rest merely upon the rule of *stare decisis*, while admitting the unsoundness of the principle, as *Clark v. Jetton*, 5 Sneed, 229.

And *Davis v. Bucher* (8 Younge & C. 379, cited *supra*), has been overthrown in England in so far as it declares that a subsequent advancement will not operate as a satisfaction in full or in part of a devise or bequest of a residue. *Meinertzen v. Walters*, L. R. 7 Ch. App. Cas. 670. See, also, *Pomeroy's Eq. Jur.* § 558; 2 *Williams' Executors* (6th Am. ed.), 1442.

BRADFORD vs. BRINLEY.

[145 Massachusetts, 81.]

DEMONSTRATIVE OR SPECIFIC LEGACIES.

In view of the facts disclosed, *held*, that certain legacies to the testator's children were specific or demonstrative and not general.

BILL in equity, filed February 1, 1887, by the trustees under the will of Samuel Dexter Bradford, late of Newport, in the State of Rhode Island, deceased, against Rebecca M. Brinley, formerly Rebecca M. Bradford, widow of the testator, and the three children of the testator, to obtain the instructions of the court as to the construction of the will.

The case was heard by Holmes, J., and reserved for the consideration of the full court, on the bill, the answers of the several defendants, and certain agreed facts; and was as follows:

Samuel D. Bradford, formerly of West Roxbury, the father of the testator, died in 1865, leaving an estate inventoried at \$1,595,334. By his will, which was duly admitted to probate, he devised his homestead estate in West Roxbury to his widow for life, with remainder in fee to his two sons, Samuel Dexter Bradford and John H. Bradford. He also bequeathed the sum of \$300,000 to trustees, in trust to pay the income to his widow during her natural life, giving her the power to dispose by will of \$50,000 of the principal fund, and directing that at her death the residue of the fund should be paid into the "residuary fund" of his estate.

The residuary clauses of this will were as follows:

"All the rest and residue of my property and estate, of whatsoever kind and wheresoever situated, real, personal, or mixed, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, or which may, by any means or cause whatsoever, be added to my estate, or come to my heirs or legatees through me, in my right, I

give and bequeath to the trustees hereinafter appointed, to be held by them in trust for the following uses, purposes, trusts, and limitations, and no other, viz. : to pay such sums as they shall deem fit and proper for the support and education of my second son, John Henry Bradford, during his legal infancy, and when said son shall attain the age of twenty-one years then to divide the said property and estate mentioned in this item of my will into two equal parts or portions, in such way and manner as they shall deem just and equitable ; one of such parts to be for the benefit of each of my sons, Samuel Dexter Bradford, Junior, and John Henry Bradford, and their heirs, and to be paid to them by the said trustees in the following manner, to wit, the part or portion of each of my said sons shall be divided into two equal parts, and one part or moiety be paid to him by the said trustees to be held by him, his heirs and assigns forever, and the other part or moiety shall be held by the said trustees, and the income and interest thereof, as it may accrue, be paid over to him, or his wife or family, if he have any, as the said trustees shall deem proper and expedient, during his natural life, and at his decease the last-mentioned part or moiety to be paid over to such person or persons, and under such limitations, regulations, and conditions, as he shall by his last will and testament direct and appoint, if he shall leave such an instrument ; and if he shall not leave a last will and testament, then to be paid to his children if he leaves any, in equal proportions, share and share alike.

“In case either of my sons shall decease leaving no issue, and having made no testamentary disposition as aforesaid, then I direct the said trustees to transfer all the funds in their hands belonging to the deceased son to the surviving son, to be paid over to him, his wife, family, legatees, or heirs, in the same way and under the same conditions as are heretofore provided for in regard to his own share of my estate.”

On January 12, 1873, Samuel Dexter Bradford, the son, died in the city of New York, leaving a will, duly executed

at Newport on October 26, 1872, which was admitted to probate on February 2, 1876, in the county of Norfolk in this commonwealth; and the plaintiffs were appointed trustees thereunder on July 14, 1886. The testator left a widow and three children, all of whom are now living and are over twenty-one years of age. His will contained the following clauses:

"Article 1. Except as otherwise provided in the subsequent articles of this will, I give, bequeath and devise to my wife Rebecca the use, benefit and enjoyment, during her natural life, of all the estate and property, real, personal, or mixed, whereof I may die seized or possessed, or to which I may in any manner be entitled, either at law or in equity, of which I am authorized by my father's will, or by any instrument, to dispose, or to direct or appoint the uses, ownership, payment over, distribution, or other disposition, by my last will or otherwise; and I direct and appoint the said Rebecca to receive, have and enjoy, for her own use and benefit, during her natural life, the income of the estate and property devised and bequeathed by my father's last will for the benefit of myself and my family, or of any other person, whereof I am authorized by my father's will or by any instrument to dispose of the income, or to direct or appoint the uses, ownership, payment over, or other disposition of such income, and which is not included in the foregoing devise and bequest to her of a life estate or life interest therein. And if, for any reason, any of the devises, bequests, appointments, or directions contained in any of the subsequent articles of this will are wholly or partly prohibited by the law governing the same, or are insufficiently made to take effect as therein intended, then I give, devise and bequeath to the said Rebecca the use, benefit and enjoyment, during her natural life, of all the property with respect to which such devise, bequest, appointment, or direction is thus prohibited or insufficiently made, or I appoint the income thereof to be paid to her during her life, according as my power to dispose of or with respect to the same extends.

"Article 2. I give and devise to my said wife Rebecca, to be held and enjoyed by her, her heirs and assigns forever, as her own absolute property, the dwelling-house and all the adjacent land at Newport, Rhode Island, constituting my residence and homestead, and all my interest, right, or title therein or thereto, either at law or in equity. And I give and bequeath to her, as her absolute property, all ready money on hand at the time of my decease; all debts, claims, and demands, due to me; all securities owned by me personally, as distinguished from those held in trust for me; together with all horses, with their harnesses and equipments, all carriages and other vehicles, all wearing apparel, watches, jewelry, and other ornaments, all paintings and other works of art, all books, all silverware, plated ware, china, glass, carpets, linen and household furniture of every description which I own or am entitled to dispose of.

"Article 3. Whereas, by the terms of my father's will, certain property, real and personal, including his homestead at West Roxbury, Massachusetts, is bequeathed and devised to be held in trust or otherwise, for the benefit of my mother, during her lifetime, and one half of the same or of the proceeds thereof may be disposed of by me, subject to her interest therein or the trusts for her benefit; I do therefore order, direct, and appoint that if my said wife is living at the time of my mother's death she shall have the use, benefit, and enjoyment of that part of said property which is thus liable to be disposed of by me, or of the income thereof, if my power extends no further than to dispose of the income, till the eldest of my children who survives me attain his or her majority. When that event happens, if she is still living, my executors are hereby directed to set apart, out of the said property, a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities, to the amount or value of one hundred thousand (\$100,000) dollars. When my second child who survives me attains his or her majority, my said executors are directed to set apart for his or her bene-

fit a similar fund of one hundred thousand dollars ; and so on in succession, as each child attains his or her majority, until a fund of the amount or value of one hundred thousand dollars has been set apart for each of my children who attains majority. My said wife shall continue to have the use, benefit, and enjoyment of the remainder of the property, or of the income of such remainder as the case may be, as each successive fund is set apart (and of the remainder, after all the funds are set apart), during her lifetime as aforesaid. And I order, direct, and appoint that at any time after my mother's death my said wife may give to any of my children, or to any issue of such child, absolutely and indefeasibly, any part of the capital of the property mentioned in this or in the first article of this will, except such portion thereof as may have been set apart to constitute any of the funds mentioned in this article, or which it is necessary to retain in order to constitute all of said funds. And every division to be afterwards made, as hereinafter provided, shall be made without reference to such gift, the residue only being divided.

"Article 4. Immediately after the death of my said wife, my surviving executors are directed to divide all the estate and property mentioned in any part of this will, except that mentioned in the second article thereof, into as many shares as I shall leave children me surviving, who have also survived till their mother's death, or who have died and left issue surviving at that time. If my mother dies before my wife, any of the funds which have been set apart as provided in the third article of this will shall be accounted part of the share to which the child or the issue of the child for whom it was so set apart would be entitled at my wife's death ; but it shall not again be divided as part of the estate mentioned in this article. If, on the other hand, my wife dies before my mother, the division provided for in this article shall be made without reference to the property bequeathed and devised by my father for my mother's benefit, as stated in the foregoing third article ; and after my mother's death that portion of said property which is subject to my dispo-

sition, as therein stated, shall be divided into as many shares as I shall leave children me surviving, who have also survived till their grandmother's death, or who have died and left issue surviving at that time. And in order to enable them the better to make the division or divisions herein provided for, and to discharge their powers and duties under this will, I hereby bequeath and devise to said executors and the survivor or survivors of them, in trust for the purposes herein mentioned, all the property mentioned in this will, except in the second article thereof, subject to the life estates and interests of my said wife and mother respectively.

"Article 5. Every fund or share to be created or set apart as hereinbefore provided for shall be equal in value or amount, in my executors' judgment, to every other fund or share to be created or set apart at the same time. Every fund or share created or set apart for the benefit of the issue of a deceased child shall be immediately paid, delivered, or transferred to such issue. Every fund or share created or set apart for the benefit of a child who is then living shall be held and managed by my executors, during the lifetime of that child, in trust to invest and reinvest the same, and to pay over the clear income thereof, deducting expenses, to that child, as the same accrues, and not otherwise, the anticipation of any such income being hereby expressly prohibited. At his or her death, leaving surviving issue, such issue shall take absolutely the capital and unexpended income of such fund or share. But if such child leaves no surviving issue, he or she may dispose of the capital and unexpended income by a last will and testament, but not otherwise. In default of any such disposition, such capital and unexpended income, or the part thereof not disposed of, shall be equally divided between my other children then surviving and the surviving issue of those who may be dead. Such issue to take the share to which the parent would have been entitled if living.

"Article 6. Whenever the issue or surviving issue of any deceased child is mentioned in this will, descendants of

all degrees are included ; and the issue of any deceased descendant shall take by representation and in severalty the share which the parent would have taken if living.

"Article 7. If my said wife shall marry again, no property or income to which she is entitled by any portion of this will, except the second article thereof, shall be received by her husband, or liable for her debts or the debts of her husband.

"Article 8. I appoint my said wife to be the guardian of my children, and I desire that my said children make my mother's house their home during their minority, and my daughters afterwards, except in the event of their marriage. But I wish my eldest daughter, Julia Emma, to continue to live with my mother till the death of the latter."

The real estate in West Roxbury, mentioned in article 3 of the will, was conveyed by the testator in fee to his mother, Julia E. Bradford, long prior to the date of said will, and the real estate mentioned in article 2 of the will, situate at Newport, was conveyed by the testator, long prior to the date of the will, to Arthur W. Austin, in trust for the creditors of said testator and for other purposes.

Julia E. Bradford, the mother of the testator, died on August 15, 1886, leaving a will, which was duly admitted to probate, and by which she exercised the power given her by the will of her husband, and disposed of the sum of \$50,000.

The plaintiffs have received, as trustees, from the residuary estate of Samuel D. Bradford of West Roxbury, the sum of \$389,101.43. This sum includes \$125,000 which the trustees received from the trust fund of \$300,000 created by the will of said Samuel D. Bradford. Rebecca M. Brinley has received no property absolutely under the will of her husband, except some household property ; but she has received since January 1, 1876, the income of one quarter of the residuary estate of Samuel D. Bradford of West Roxbury, amounting since the death of her husband to the sum of \$156,278.89.

H. G. Parker, for the widow.

E. L. Rand, as guardian *ad litem*.

F. J. Stimson, for the children.

HOLMES, J. It may be conjectured with some plausibility that what the testator really had in mind in the third article of his will was the whole trust of one quarter of the residue under his father's will,—a fund which would be sufficient to give all the children their legacies, even on the view that the legacies to them were specific. But, in the opinion of the majority of the court, the description of the fund is so definite as to exclude this construction, which could be reached only by a somewhat violent transposition of language which is plain as it stands.

The case between the widow and children, therefore must depend upon the question whether the legacies to the children are specific or demonstrative.

We must assume that the testator remembered that, before the date of the will, he had conveyed away the West Roxbury homestead mentioned in article 3, as the will does not necessarily imply the contrary. The homestead is only mentioned as part of the property left by the testator's father to be disposed of by the testator, subject to his mother's life interest, and serves to identify the fund referred to. But the testator only affects to dispose of the property which "is" liable to be disposed of by him, or of the income if his power "extends" no further than to dispose of the income,—using the present tense and words which are satisfied without attributing to him an attempt to devise the homestead which he no longer owned.

The fund in question, therefore, could not be more than \$150,000, or possibly \$175,000, because that was the largest sum which could come to him under the clauses of his father's will referred to. And as he directed that his wife should receive the whole income of the fund until the time for setting apart the first \$100,000, and the income of what

remained after each sum of \$100,000 was set apart, the testator could not have expected the fund to be increased by accumulations. It follows that he could not have expected the three funds of \$100,000 each to be raised from property by no possibility amounting to more than \$175,000. We may add a further consideration. The testator contemplates in terms the possibility that his power may extend no further than to dispose of the income of the specific property mentioned. This makes it still harder to suppose that he relied on this property alone. The reason for the testator's doubt points the same way. The property which he deals with in the third article did not come to him as a separate fund, but was left to him along with that which he disposes of in article 1, as part of the residue under his father's will.

For, although his father's will created a separate fund of \$300,000, at least \$250,000 of it was to be paid into the residuary fund upon his father's widow's decease, and his own title was only under the residuary clause, making the present testator and his brother residuary legatees, and giving one-half of his half to the present testator outright, and the other half in trust for him or his family, etc. Hence the testator actually received his share of the \$300,000 as part of a larger fund, and the separation of a part of the residue from the rest which with reference to its remote origin is purely imaginary.

The testator does not say that the sums for the other children after the first shall be raised from the property mentioned in article 3, but simply that they shall be set apart. He then goes on to empower his wife to give his children any part of the capital mentioned in this or in the first article, "except such portion thereof" as may have been set apart, or may be needed to constitute the funds of \$100,000. "Thereof" refers grammatically to the capital mentioned in the first article, as well as to that mentioned in the third; and on its face the clause imports that a portion of the capital mentioned in the first article may be needed to constitute the funds. In view of the arbitrary character of the separation between the capitals mentioned

in the two articles, and the certainty that the fund mentioned in the third article would be insufficient, this interpretation seems not only grammatical, but reasonable.

The whole difficulty is raised by the direction, when the first child reaches majority, "to set apart out of the said property," i. e. out of the \$150,000, "a fund for the benefit of said child, consisting of money or securities, or partly of money and partly of securities, to the amount or value of one hundred thousand dollars." It is argued that this legacy is specific; and that the direction to "set apart" "similar" funds for the other children must be taken to mean legacies of the same character, and is further shown to have this meaning by the provision that the testator's wife shall continue to have the use, etc., of the remainder of the property.

Whether the legacy to the first child is specific or not, it cannot be allowed to cut down or to limit the legacies of like amounts to the other children, which are not made specific in terms. The testator shows by articles 4 and 5 that he means his children to share his property equally, while the result of holding all the legacies specific would be to give the first child \$100,000, if the fund was sufficient, the second not more than \$75,000, and the third nothing, and the facts leading to this result were known to the testator.

The gift of the use of the remainder of the property to the testator's wife is made sensible by taking "the property" to include that mentioned in the first article, of which also she is given the use for life. When the specific property of \$150,000 is referred to earlier in the article, it is referred to as "the said property." In this connection, again, the arbitrary character of the separation of the property mentioned in article 3 should be kept in mind.

There is enough to pay the legacy of the first child, upon any construction of the will. The result will be the same, whether we suppose that the testator began by specifically disposing of the fund described, and then, for the sake of equality, gave to the other children general legacies

of the same amount as the specific legacy to the eldest, or say that all the legacies are demonstrative. Many cases of weight, although not binding upon us as authority, go far towards deciding that the legacy to the first child, if it stood alone, even, should be regarded as demonstrative. It is unnecessary to consider how far they are reconcilable with *Bliss v. American Bible Society* (2 Allen), 334, and other Massachusetts cases. (See *Boys v. Williams*, 2 Russ. & Myl. 689; *Cunliffe v. Cunliffe*, 23 W. R. 724; *Sparrow v. Josselyn*, 16 Beav. 135; *Vickers v. Pound*, 6 H. L. Cas. 885; *Mytton v. Mytton*, 44 L. J. Ch. 18; *Bowen v. Dorrance*, 12 R. I. 269.)

For these reasons, a majority of the court are of opinion that, as article 1 is in the nature of a residuary clause, and the gift to the testator's widow is subject to the provisions of the other articles, the legacies of \$100,000 to each of the children must be paid in full.

Decree accordingly.

See, also, *Tomlinson v. Bury*, 261, *supra*.

BAKER vs. BROWN.

[146 Massachusetts, 369.]

A WIFE'S BEQUEST FOR THE MAINTENANCE OF HER HUSBAND.— RIGHTS OF THE HUSBAND'S CREDITORS.

A married woman, alleged to be possessed of realty "of the value of \$10,000, and other real and personal property of a value to the plaintiff unknown," by her will, gave pecuniary legacies amounting to \$2,100 to two married daughters and to her son, who was her executor, and, after expressing a desire that her husband should be supported out of her property, left the residue of her estate to two adult unmarried daughters subject to the condition that they "support

their father during his life." *Held*, that the husband had no interest under the will which a creditor could reach by a bill in equity under the Pub. Sts. c. 151, § 1, cl. 11.

TWO BILLS IN EQUITY, under the Pub. Sts. c. 151, § 1, cl. 11, to reach and apply, in payment of debts due to the plaintiffs from Joseph D. Brown, his interest in the residue of the estate of his wife, Lucy R. Brown. The bills allege the following facts.

The plaintiff in the first case recovered judgment against Joseph D. Brown, on October 17, 1884, for the sum of \$545.39, damages and costs, no part of which had been paid; and the plaintiff in the second case recovered judgment against him on June 26, 1882, for \$160.45, damages and costs, of which only \$8.72 had been paid.

Lucy R. Brown, who was seized of real estate in this commonwealth, "of the value of \$10,000, and other real and personal property of a value to the plaintiffs unknown," died on March 24, 1886, leaving a will, which was duly admitted to probate, and which, with the exception of parts merely formal, was as follows: "I give to my daughters, Lucy R. Vialle and Elizabeth Worthley, \$1,000 each. I give to my son, Joseph D. Brown, Jr., one hundred dollars. It is my desire that my husband should have his support out of my property during his life; therefore all the rest, residue, and remainder of my estate both real and personal, after the payment of my just debts, funeral charges, and the legacies before named, which are to be paid within six months after my decease, I give and devise to my daughters, Abbey Brown and Mary Brown, and their heirs and assigns forever, subject to the condition that they support their father during his life. I hereby nominate my son, Joseph D. Brown, Jr., to be the executor of this my last will and testament; as witness my hand and seal this 12th day of June, A. D. 1883."

Abbey Brown and Mary Brown "accepted the above recited devise and bequest of Lucy R. Brown," and "Joseph D. Brown, under and by virtue of the said will, became entitled to a property right, title, or interest, legal or equita-

ble, in the property and estate of said Lucy R. Brown, which cannot be come at to be attached or taken on execution in a suit at law against said judgment debtor."

The prayer of each bill was that Abbey Brown and Mary Brown might be restrained from alienating the interest of Joseph D. Brown; that they might be ordered to pay to the plaintiffs sums equivalent to his support during his lifetime and until the debts were paid; and for general relief.

The defendants, Joseph D. Brown, Abbey Brown, and Mary Brown, demurred to the bills for want of equity, and on the ground that Joseph D. Brown had no interest in his wife's estate that could be applied to the payment of the plaintiffs' debts; and the remaining defendant, Joseph D. Brown, Jr., demurred to the bills for want of equity, and because he was not a proper party. At the hearing before a single justice, the demurrers were sustained and the bills dismissed; and the plaintiffs appealed to the full court.

Samuel Hoar, for the defendants,

E. G. Loomis, for the plaintiffs.

C. ALLEN, J. It was decided in *Broadway National Bank v. Adams* (133 Mass. 170), that the founder of a trust may secure the income of it to the object of his bounty, by providing that it shall not be alienable by him, or be subject to be taken by his creditors. Such provision need not be in express terms, but it is sufficient if the intention is fairly to be gathered from the instrument when construed in the light of the circumstances. The only question in the present case is, whether enough appears to show such intention.

The existing circumstances are not so fully disclosed as might be wished, but it appears that the testatrix was a married woman, possessed of real estate in this commonwealth of the value of ten thousand dollars; the averment of other property is too vague to be considered as of any significance; and in her will she expressed her desire that

her husband should have his support out of her property during his life, and therefore, after giving \$2,100 in pecuniary legacies to other persons, she gave all the residue of her estate to two daughters, subject to the condition that they should support their father during his life. In one of the two cases now before us, it appears that the plaintiff recovered a judgment against the husband for about \$160, a year before the will was executed, on which less than nine dollars had been paid; in the other case, it does not appear when the plaintiff's claim accrued. There is no averment in either case that the real estate was income producing, or that the husband had any property, income, business, or means of support, except from his daughters.

In the absence of anything to show the contrary, it may fairly be inferred that the daughters upon whom this duty of supporting their father was cast were of age, and that they were unmarried and lived with their parents. They retained their maiden names. There is nothing to show how much the estate would be diminished by the debts which are referred to in the will, and by the funeral charges and expenses of administration. The residue must necessarily be quite moderate in amount. The will does not provide that the income of this residue shall be paid to the beneficiary, or devoted in whole to his use; there is no provision for the payment of any money at all to him; but his daughters are to support him. His age is not given, but he had five children, two married daughters, a son old enough to be appointed executor of the will, and the two daughters to whom the residue was given. In the absence of any averment to the contrary, it is a fair inference that he was pretty well along in years, poor, and dependent upon the support to be furnished by his daughters. There was probably some good reason why no bequest was made directly to him; it may have been his age, infirmity, incapacity, condition of indebtedness, or other reason not disclosed. It is sufficiently apparent that the testatrix intended that the trust imposed upon her daughters should be discharged by them personally, by furnishing to their

father from time to time food, clothing, fuel, shelter, medicines, care, and nursing, as he might need them, and probably this support was to be furnished on the premises where they all lived. Assuming it to be true that they lived in a house owned by the testatrix, the case would be stronger for implying that the support was, in their option, to be there furnished, than in *Parker v. Parker* (126 Mass. 433), or *Dwellely v. Dwellely* (143 Mass. 509), in both of which cases it was held that the beneficiary had no right to demand a support elsewhere.

Clearly, the beneficiary has no right to the income of the devised estate, which he can control, but, to use the language of Lord Hatherley, the trustees are to apply the same, "with their own hands, as it were," to the use of their father. (*Chambers v. Smith*, App. Cas. 795.) The amount to be devoted to his support, and the manner of applying it, by continuing or receiving him as a member of their own household, by personal care and attention to his wants, or otherwise, rest wholly in their discretion, so long as they do not abuse their trust. Under this state of things, a court of equity will not put a valuation upon his necessary support, and order his daughters to pay it over to creditors, leaving him, it may be, to be supported by charity or by the town. A creditor's claim is not so high as that. (*Broadway National Bank v. Adams*, *ubi supra*, and cases there cited. See, also, *Thackara v. Mintzer*, 100 Penn. St. 151; *Steib v. Whitehead*, 111 Ill. 247; *Lampert v. Haydel*, 20 Mo. App. 616; *Chambers v. Smith*, 3 App. Cas. 795, 806, 807, 811, 812.)

Bills dismissed.

STURGIS vs. PAINE.

[146 Massachusetts, 354.]

CONSTRUCTION OF A WILL.—WHAT WORDS OF RECOMMENDATION ARE NOT SUFFICIENT TO CREATE A TRUST.

A testator, after expressing his "desire" that a residue should go to his grandchildren, "reserving the use of the personal property and the net income of the real estate" to his son's wife, their mother, "during her life and widowhood" if she survived his son, "to this end" gave the residue to his son in trust to apply the income "at his discretion" for the care and education of such grandchildren; provided that, if his son should die, his son's wife while his widow "shall in like manner receive" such income "to her own use and for the education and support of my said grandchildren at her discretion;" and directed that neither his son nor his son's wife should be held to account for property personally occupied by them, and that proceeds of real estate should be applied to improve his estate, or for the grandchildren's education and support. *Held*, that the son's wife, as his widow, had the right in good faith to appropriate the whole income to her own use.

BILL IN EQUITY, filed October 11, 1884, to establish trusts for the benefit of the plaintiff under the wills of her grandfather, William Paine, and of her father, Frederick William Paine.

The case was heard by Field, J., and reserved for the consideration of the full court, on the pleadings and an agreed statement of facts, and was in substance as follows.

William Paine died in 1833, leaving a will, whereby he devised the residue of his property as follows:

"Fourth. As to the residue of my property, it is my desire that the same should be secured for the benefit of my grandchildren, the children of my son, Frederick William Paine, reserving the use of the personal property and the net income of the real estate to Ann C. Paine, wife of said Frederick, during her life and widowhood, upon the contingency of her surviving her said husband; and to this end I give, devise, and bequeath all my estate, real, personal, or mixed, and wherever the same may be found, not before disposed of in this will, to my son, Frederick William Paine, and his heirs forever. To have, hold, and possess

the same to him and them upon the trusts and to the uses hereinafter mentioned, and to no other use, trust, or purpose whatever ; that is to say, the said Frederick shall annually receive the rents, interest, and profits of said estates, and, after deducting the necessary expenses for repairs, taxes, and other charges in and about the same, shall retain the balance in his own hands, to be applied by him at his discretion for the support, maintenance, and education of the children of the said Frederick and his present wife, Ann C. Paine, including the children now born as well as such as may at any time hereafter be born to them, either before or subsequent to my decease. And in the event of the decease of my said son, his said wife, so long as she shall survive him and continue his widow, shall in like manner receive the said rents, interest, and profits to her own use and for the education and support of my said grandchildren at her discretion. Upon the event of the demise of my said son, I direct that the judge of probate for said county of Worcester shall appoint one or more trustees to take upon him or them the execution of these trusts, who shall stand seized of said estates in the same manner as I have directed in case of my son Frederick during his lifetime, and as fully as if they were personally named in this will. And the said trustee or trustees so appointed shall hold said estates to the following trusts ; that is to say, to pay over the balance of said trust funds to Ann C. Paine, my daughter-in-law before named, during her life or widowhood, and upon the event of her contracting a second marriage, then it is my will that said trustee or trustees shall stand seized of said real estates and hold and possess said personal property to the use of my said grandchildren, the children of Frederick William and Ann C. Paine, during their minority, and whenever either of said children shall arrive at full age, said trust, as it relates to him or her respectively, shall cease and determine, and said child shall stand seized in fee simple of his or her share in said real estate and personal estate, in the same manner as if it had been bequeathed to him or her without the intervention of trus-

tees. Provided, however, that said trust shall not determine during the lifetime of my said son, nor until the death or second marriage of the said Ann C. Paine. Upon the termination of said trust, said property shall be equally divided between such of said grandchildren as may then be alive, and if either of them shall de cease before a division of said property, leaving lawful issue, the issue of such deceased grandchild shall be entitled to the same share in the distribution as his or her ancestor would had they been living.

"In case my son should not accept the trust hereby vested in him, or in case of his subsequent resignation of the same, or in case of a vacancy in the trust at any time, then one or more trustees shall be appointed by the judge of probate, the Court of Chancery, or other proper tribunal, in manner as hereinbefore directed. And the said trustee or trustees so appointed shall stand seized of said estates and personal property to the uses herein specified. Provided, however, that no trustee shall be appointed during the lifetime of my said son without his consent.

"The trustees herein provided for shall in all cases render an inventory of said estates and funds from time to time, as they may be ordered by the proper tribunal, and shall give satisfactory bonds for the faithful execution of said trusts. Provided that no other security shall be required of my said son, while in the execution of said trust, but his own personal bond. Any other trustee shall pay over the net proceeds of said estates, real and personal, to the joint order of my said son and his said wife during their lives, and to the order of the survivor of them during life, or during the widowhood of the said Ann C. Paine, to be by them appropriated as is before provided. It is my further direction, that my said son or his wife shall never be held to account for the rent, income, or use of such parts of my property or chattels as they shall personally occupy, and such personal occupation shall not be construed to impair this trust.

"My trustees, whether appointed by me or by any prop-

er tribunal, shall have power to sell and pass deeds of any part of my real estate (excepting the home farm and every part thereof), either in fee simple, absolute, or upon mortgage or any less estates, and for the proceeds of any such conveyances they shall render an account as is before provided, and the same shall be applied solely for the improvement of said estates, or for the education and maintenance of my said grandchildren."

Frederick William Paine held the position of trustee under this will, from 1833, to September, 1869, when he died, and the defendant, Nathaniel Paine, was appointed trustee in his stead on November 16, 1869, and has so continued ever since. Nathaniel Paine proceeded to convert the greater part of the home farm so called into money by sales under a decree of the Probate Court, and established from the proceeds a trust fund, which, as increased by other sales from time to time, he invested in income-yielding securities. The income upon these securities, and the rents and profits of real estate remaining unsold, were paid over by the trustee, after deducting expenses and charges, to the defendant Ann C. Paine, without seeing to its application by her in any part for the support of the plaintiff, who is a child of Ann C. Paine and Frederick William Paine, and grandchild of William Paine, or that any part of the same was paid to her or accumulated for her use and benefit. Ann C. Paine invested the income, rents, and profits, including all accumulations not consumed by her in her own support, or in the support of her children other than the plaintiff, in various ways, and on or before May 1, 1884, gave large sums, as well as the mansion-house on the home farm purchased by her, to the defendant George S. Paine as voluntary gifts, and gave to the defendants George S. Paine and James P. Paine all of the accumulations of income, rent, and profits. The plaintiff has received no part of the income of the trust fund or rents and profits, and has, under the belief that she was entitled to a vested share and interest therein, allowed the same to accumulate for her future use and benefit.

Nathaniel Paine contended that, upon paying the income of the proceeds of the sales of the homestead farm and such rents and profits to Ann C. Paine, his powers and duties, as trustee under the will, regarding the income and rents and profits, ceased; and the defendant Ann C. Paine contended that by the terms of the will she became the absolute, sole, and exclusive owner of such income and rents and profits, with the right to dispose of the same to George S. Paine and James P. Paine, to the exclusion of the plaintiff and the children of deceased grandchildren of the testator, both before and after its accumulation and investment; that the gifts of accumulated income and rents and profits to George S. Paine and James P. Paine, not consumed in her personal support, or necessary for their personal support and maintenance, were made by her as of right, and that the plaintiff had no right, title, or interest, in any part of the income derived from the proceeds of the sales of land of the homestead farm, or rents and profits, by reason of any devise, bequest, or trust in the will.

The plaintiff contended that, by the terms of the will, she had a vested right and interest in the income of the proceeds of sales of land of the homestead farm, and in the other rents and profits, and in all accumulations thereof; that she had a right to allow the same to accumulate for her future use and benefit, and was not thereby deprived of her right to the same; that both the trustee and Ann C. Paine were bound to see that the income, rents, and profits were applied or accumulated for her use and benefit, in common with the application and accumulation thereof for the use and benefit of Ann C. Paine and the other grandchildren of the testator; that the conveyances of the accumulated income and rents and profits by Ann C. Paine were in violation of her rights thereto under the will, and against the intention of the testator; and that the trustee, Ann C. Paine, George S. Paine, and James P. Paine, were bound to account to her for her share of such accumulated income and rents and profits.

On November 16, 1869, Frederick William Paine died,

leaving a will. After directing his debts and funeral expenses to be paid, he devised the residue of his property as follows: "Fourthly. I give to my wife, Ann C. Paine, all the rest of my estate, whatever the same may be, to be at her sole use and disposal. My said wife is fully acquainted with my reasons for this disposal of my estate, and will by her own last testament do what is right and just by my children and their natural heirs." On the settlement of his estate, the residue in money was paid over to Ann C. Paine.

Ann C. Paine invested the money received by her on the settlement of her husband's estate in securities, all of which she assigned to George S. Paine and James P. Paine as gifts, and conveyed to them all of the real estate and other property received by her from that estate as their absolute property, to the exclusion of the plaintiff and the children of deceased children of Frederick William Paine, and retained no property in her hands or possession to be disposed of by will.

Ann C. Paine, George S. Paine and James P. Paine contended that the will of Frederick William Paine vested Ann C. Paine with an absolute title, and the right to dispose of the same by deed and gift during her lifetime, to the exclusion of the plaintiff, and that the conveyances by her were valid under the will.

The plaintiff contended that Ann C. Paine had only the use of the property, and not the absolute title to it, and could dispose of the same by will only to her children and their natural heirs, and that her conveyances and gifts to George S. Paine and James P. Paine, in exclusion of the other children of the testator, were in violation of the intention of the testator as expressed in the will.

If the court were of opinion that the plaintiff had any title and interest in the income of the proceeds of the sales of the homestead farm under and as devised or bequeathed by the will of William Paine, or in the rents and profits of his unsold real estate, or any title or interest in the estate of Frederick William Paine under his will, the case was to be

referred to a master to state the account thereof; otherwise, the bill was to be dismissed.

F. P. Goulding and *U. A. Merrill*, for the plaintiff.

W. S. B. Hopkins, for the defendants.

HOLMES, J. This is a bill in equity seeking to establish a trust in favor of the plaintiff, under her grandfather's will, in respect of the income of the residue given to the defendant Ann C. Paine during her widowhood, and for the education and support of her children at her discretion. We shall assume that the plaintiff has a standing to maintain a bill, so far that, if it were shown that Mrs. Paine had not exercised in good faith the discretion given to her, this court might interfere. (*Wilson v. Wilson*, 145 Mass. 490.) But, in the absence of bad faith, we are of opinion that the testator's grandchildren have no equitable interest or title in or to the rents, income, and profits given to Mrs. Paine unless and until she exercises her discretion in their favor, and that, so far as appears, Mrs. Paine was entitled to appropriate the whole to her own use as she has done.

The testator begins by stating his desire that the residue of his property should be secured for the benefit of his grandchildren, the children of his son Frederick William Paine, "reserving the use of the personal property and the net income of the real estate to Ann C. Paine, wife of said Frederick, during her life and widowhood, upon the contingency of her surviving her said husband." Under these words, the gift to Mrs. Paine during her widowhood is as much a part of the testator's expressed desire as that to his grandchildren, and it is a gift of the beneficial interest. He next proceeds, "and to this end I give," &c., to his son in trust. The words "to this end" mean to the end of carrying out the above expressed desire in all its parts; and it is in the light of this statement of the general purpose that the following provisions are to be read.

The trusts are, first, that "the said Frederick shall annu-

ally receive the rents, interest, and profits of said estates, and, after deducting the necessary expenses, &c., . . . shall retain the balance in his own hands, to be applied by him at his discretion for the support, maintenance, and education of the children of the said Frederick and his present wife, Ann C. Paine," &c. The will then goes on, "and in the event of the decease of my said son, his said wife, so long as she shall survive him and continue his widow, shall in like manner receive the said rents, interest, and profits to her own use and for the education and support of my said grandchildren at her discretion."

It is argued that the words "shall in like manner receive" mean that Mrs. Paine is to take upon the same trust as her husband,—that is, that the words "in like manner" qualify not only "receive," but also "to her own use" and what follows. But we think that, so far as they are more than a vague rhetorical introduction to the ensuing clause, they have no effect on any word except "receive." Looking back to the directions referred to, we think that only so much of these are meant as point out how Mr. Paine shall "receive" the rents, &c., and deduct expenses; not the subsequent directions to "retain" and "apply" the balance. Mrs. Paine cannot receive the income to her own use in like manner as her husband. It is not stated expressly that he shall receive it to his own use at all; and if she were to do so, as he did, the words would be inserted merely to arrest the legal title in her and leave her a dry trustee, whereas she is not to have the legal title after her husband's death, but the will provides that a trustee shall be appointed by the Probate Court.

The words "to her own use" plainly mean that Mrs. Paine is to have a beneficial interest in the fund, as is further shown by the provision that on her second marriage the trustee shall hold to the use of the grandchildren. The following words mean just what they would have meant if the order had been changed, and they had read, "and, at her discretion, for the education," &c. If there were nothing in the will before the gift to Frederick, the

husband, in trust, we should feel compelled to construe it as we have done; but when we see in addition that our construction carries out what the testator just before has declared to be his desire, we cannot feel any very serious doubt about the case. The provision is a most natural one, and it may be presumed that the testator was satisfied that he could leave the support and education of his grandchildren to their mother with safety. (See *Hess v. Singler*, 114 Mass. 56; *Sears v. Cunningham*, 122 Mass. 538; *Barrett v. Marsh*, 126 Mass. 213; *Lambe v. Eames*, L. R. 10 Eq. 267; s. c. L. R. 6 Ch. App. 597; *In re Hutchinson & Tenant*, 8 Ch. D. 540; *In re Adams & Kensington Vestry*, 24 Ch. D. 199; s. c. 27 Ch. D. 394, and cases below.)

The direction that the testator's son or his wife shall not be held to account for property personally occupied, does not affect the construction of the previous provisions. But for it, the son as trustee would be bound to account for such property. The wife receives from it an indirect authority to occupy, which, not being the trustee, she would not have otherwise; and she is exonerated from going through the form of accounting to the trustee, who, if she went through that form, would account to the court by paying back to her what he had received.

The direction that proceeds of conveyances of real estate shall be applied solely for the improvement of the testator's estates, or for the education and support of his grandchildren, concerns the capital, which goes to the grandchildren.

The complainant makes a further claim under the will of her father, the residuary clause of which is as follows: "I give to my wife, Ann C. Paine, all the rest of my estate, whatever the same may be, to be at her sole use and disposal. My said wife is fully acquainted with my reasons for this disposal of my estate, and will by her own last testament do what is right and just to my children and their natural heirs." The last words do not create a trust, but state the motive for not doing so. They express the testator's confidence that his wife will do what is just of her

own motion, as a reason why he leaves the property to her unfettered disposition. (See cases *supra*. *Thorpe v. Owen*, 2 Hare, 607, 617; *Mussoorie Bank v. Raynor*, 7 App. Cas. 321.)

Bill dismissed.

See, also, *Colton v. Colton*, 11, *supra*, and the note; *Sale v. Thornberry*, 149, *supra*; *Holland v. Alcock*, 188, *supra*, and the note; *Dascomb v. Marston*, 248, *supra*.

MCKENZIE vs. ASHLEY.

[145 Massachusetts, 577.]

CONSTRUCTION OF A WILL.—“A GOOD AND COMFORTABLE SUPPORT.”

A testator bequeathed to his wife, in lieu of dower, the income for life of the residue of his estate after the payment of two legacies to herself, and also so much of the principal as should be necessary to give her “a good and comfortable support.” With \$1,100 of her own money, and \$2,500 paid her from the principal of the trust fund, which was paid to her with the consent of the remainderman, she purchased a house, in which she lived for several years on the income received from her husband’s estate. Subsequently, the income became insufficient for her support, and she requested that another part of the principal be paid to her. *Held*, that she was not obliged to dispose of her house and use the proceeds thereof for her support, before her request could be granted.

BILL IN EQUITY by the executor of the will of Josiah D. Ashley, alleging that said Ashley died on January 20, 1871, leaving a will, which contained the following clauses :

“To my beloved wife, Mariah Ashley, I give and bequeath all my household furniture and wearing apparel.

“I further give and bequeath to my beloved wife, Mariah, the sum of seven hundred dollars.

“To my beloved wife, Mariah, I further give and be-

queath the use of all the rest and residue of my estate during her natural life ; but, should the use of my estate not be sufficient to give her a good and comfortable support, then it is my will that she use so much of the principal as shall be necessary to give her a good and comfortable living during her lifetime ; this in lieu of dower, subject, however, to the payment of my just debts and funeral expenses.

"I give and bequeath one hundred dollars to Frederic Alderman, son of Nelson Alderman, out of that part of my estate made subject to my wife's use, to be paid after her decease.

"I give and bequeath to Joseph B. Hascall all of that portion of my estate not before disposed of, made subject to my wife's use, that shall remain unexpended at her decease."

The bill further alleged that the estate of the testator consisted mostly of real estate, which was sold for the payment of debts, under a license from the Probate Court ; that the proceeds, after payment of liabilities, had been invested by the plaintiff, and the income paid to the widow of the testator, as provided in the will ; that on May 20, 1871, Joseph B. Hascall, the remainderman, executed an instrument in writing, by the terms of which he agreed that the plaintiff might appropriate from the principal the sum of \$2,500 "for the comfort and the comfortable support" of the widow of the testator ; that said sum was so appropriated, and was duly allowed by the Probate Court in the plaintiff's account as executor ; and that since said payment other sums had been paid to the widow out of the principal, and had been accounted for and allowed in the Probate Court.

The bill further alleged, that the widow contended that the income of the estate was not sufficient to give her a good and comfortable support.

The prayer of the bill was that the plaintiff be instructed as to the proper execution of his said trust.

The case was heard by Holmes, J., who reported it for the consideration of the full court, in substance as follows :

It was admitted that the income of the fund now in the plaintiff's hands was not sufficient to give the widow "a good and comfortable support," but the representatives of Joseph Hascall, the remainderman, who is now deceased, rely upon the fact, also admitted, that on May 20, 1871, the sum of \$2,500 was appropriated to the widow's use, by the consent of said Hascall, and that this sum was used by the widow, in the purchase of a house, which she now occupies. This sum has not been exhausted upon her support, otherwise than as above set forth.

It was further agreed, that at the testator's death, and at the time of the widow's receipt of said sum of \$2,500, the income of the fund applicable to her support was \$600, and that the income was sufficient for her support for some years after the receipt of said sum. It was proved, subject to the question of the admissibility of the evidence, that Hascall intended that the widow should purchase a house, and expressed his approval of this purchase, in a conversation, before the instrument was made by him; that the widow is now seventy-seven years old and partially paralyzed, and thought at the time of the purchase that she could be more comfortable in a house of her own, which she had always been accustomed to, than she would be in hired lodgings. She was in the ordinary health of people of her age at the time of the purchase. The house purchased was of the same class that she had previously lived in with her husband. At the time of the purchase, the rent of the house was \$15 or \$16 a month. It cost \$3,600, but it is now worth about \$1,800.

H. B. Stevens, for the widow.

E. B. Maynard & C. C. Spellman, for the representatives of Hascall.

KNOWLTON, J. The defendant Mariah Ashley was entitled, under the will of her husband, to the income for life of the residue of his estate after the payment of two lega-

cies to herself, and also to so much of the principal as should be necessary to give her a good and comfortable support. After her death, Frederic Alderman, one of the defendants, is to be paid \$100 from what is left, and the remainder is to be given to the representatives of Joseph B. Hascall, a legatee who has deceased since the death of the testator. The income is now insufficient for the support of Mariah Ashley, and the plaintiff should provide for her from the principal, unless the whole or a part of \$2,500, paid her in 1871, is first to be used for that purpose. With this sum paid her, and with \$1,100 of her own money, she bought at that time a house for her home, and has occupied it ever since. The only question in the case is whether she must dispose of that house, or of some interest in it, and use the proceeds, before she can receive anything more from the principal of her husband's estate.

The words in the will, "a good and comfortable support," and "good and comfortable living," are to be construed liberally. She is the testator's widow, and this provision is in lieu of dower. Moreover, the facts that no one else was to receive anything under the will until after her death, and that the entire estate was set apart by the testator for her use if she should need it, indicate an intention on his part that she should be well supported.

The house which she bought was of the same class that she had previously lived in with her husband, and would rent for fifteen or sixteen dollars per month. She was well advanced in years, and had always been accustomed to living in a house of her own. When the payment of \$2,500 was made, the income of the fund was sufficient for her support, and continued to be for some years afterward. This payment was accounted for and allowed in the Probate Court, with full knowledge, on the part of those interested, of the use to which it was put, and it has apparently never been objected to. Indeed, Joseph B. Hascall, who, as residuary legatee, was the only person interested against it, —except in the remote contingency of the fund being so far consumed as to affect the legacy of \$100 to Frederic Alder-

man,—consented in writing to the payment, well knowing that the money was to be used in the purchase of this house. In the light of these facts, we cannot doubt that the procurement of a house to be used as a home for Mariah Ashley was reasonably necessary, and that the cost of it was properly chargeable to the fund for her support.

If the \$2,500 had been exhausted in procuring such a home for her lifetime, the case would be free from difficulty. But she obtained an estate in fee, and after her death this house will pass under her will or descend to her heirs. To have kept strictly within the purpose for which the money was to be appropriated under the will, she should have applied it to the purchase of an estate for her personal occupation during her life, and, if it became necessary to acquire the whole title, the remainder should have been held for the benefit of the fund. Instead of making a strict appropriation of the payment with a view to the preservation of the legal rights of all parties, she put \$1,100 of her own money with it, and bought the house, and took an estate in fee to herself. The property has diminished in value and is now worth but \$1,800. Eleven thirty-sixths of that sum represent a payment from her own money, and twenty-five thirty-sixths a payment from the principal of the fund. The use, too, of the contribution from her own property has apparently gone in diminution of the sum which the fund would otherwise have been required to supply. Does her holding a title in fee, instead of for life, in this share, preclude her from claiming support until she shall have disposed of the remainder, and consumed the proceeds?

Her purchase was made at a time when it was not expected that this question could ever arise. The income was then ample for her wants, and continued to be for several years. It is fair to suppose that she acted in good faith, and that all parties interested consented to her action. The payment having been made to her absolutely, as needed for her support, with the consent of the only one interest-

ed, she might apply it as she chose, without accounting for any part of it, if the income should continue to be sufficient for her wants. It was only in the unexpected event of her needing more of the principal, that her disposition of it would become material. Moreover, there may have been practical objections to complicating the title with a division of it into different estates. There is nothing to indicate that any one suggested taking the title differently at the time of the purchase. On the contrary, the approval of the account in the Probate Court, and the payment to her of portions of the principal from time to time afterward, all of which have been accounted for and allowed, indicate that all parties interested have treated this purchase as a final disposition of the \$2,500 in accordance with the provisions of the will. If the money had been paid her for her support, and she had lost it, it would hardly have been contended that she could not afterward, if needy, have resorted to the fund for relief. All she received was used more than sixteen years ago. Most of it was properly applied to a use contemplated by the will,—the procurement for her of a home for life. The remaining part, which represents the excess of value of the estate after her death above the contribution from her money, was so paid out and used in connection with the first, as to be difficult of separation from it. And this was done, as we infer, under an implied agreement of all parties to consider it a payment authorized by the will.

We do not think, under the circumstances of this case, that Mariah Ashley's ownership of an estate in the house which will extend beyond her lifetime is such a possession of property received from the plaintiff as to require her to dispose of it and apply the proceeds to her support, or render it necessary that a transaction so long assented to should be now disturbed. The plaintiff may therefore properly pay her, under the will, such sums, in addition to the income, as she may need for her comfortable support.

Decree accordingly.

Bequests void for uncertainty of the quantity.—Exceptions.—Quantity ascertainable from statement of purpose.—As a general rule it is essential to the effectiveness of a devise or legacy that it be of a definite or ascertainable quantity. "A bequest of what shall remain," says Mr. Jarman (1 Jarman on Wills, 4th Eng. ed. 362), "or be left at the decease of the prior legatee (*Perry v. Merritt*, L. R. 18 Eq. 152; *Bland v. Bland*, 2 Cox 349), or of what the legatee is possessed of at the time of death (*Attorney-General v. Hall*, 1 Jacob & W. 158, n.), or of what he does not want (*Sprague v. Barnard*, 2 Bro. C. C. 587), or does not spend (*Henderson v. Cross*, 29 Beav. 216), or of what he can transfer (*Flint v. Hughes*, 9 Beav. 342), or of what he can save out of his yearly income (*Cowman v. Harrison*, 17 Jur. 813), or of what remains undisposed of, or is not disposed of by deed or will (*Beurn v. Gibbs*, 1 Russ. & M. 614), or the 'bulk' of certain property (*Palmer v. Simmonds*, 2 Drew 221), or a gift of the whole legacy in case of the death of the prior legatee intestate, is void for uncertainty." *Cuthbert v. Purrier*, Jacob, 415.

In such cases the quantity is not only uncertain, but unascertainable also at the time from which the will is said to "speak." But although the quantity of a bequest be left undetermined by the testator, it will not fail for uncertainty if from other expressions in the instrument, construed in the light of the circumstances of the case, it is possible to ascertain the testator's intention; as, for example, in the principal case where the *purpose* of the bequest is stated by the testator. And under this rule, bequests for the maintenance and support of a legatee or of the testator's widow, or for the education of an infant, are held to be ascertainable and not to be void by reason of no amount being definitely designated. *Hart v. Hart*, Ga. 1889, 8 S. E. Rep. 182; *Kilvengton v. Gray*, 10 Sim. 293; *Broad v. Bevan*, 1 Russ. 511 n.; *Pride v. Fooks*, 2 Beav. 480; *Beach on Wills*, § 330.

In *Bronson v. Strouse* (Conn. 1889, 17 Atl. Rep. 699), the testatrix directed a certain portion of her estate to "be set apart, and the principal and income thereof applied to the maintenance and support of such of my heirs-at-law as shall or may be in need of pecuniary assistance," the times and amounts of such distributions being left entirely to the discretion of the executors, and it was held that the bequest should not fail for uncertainty.

So in *Jackson v. Hamilton* (3 Jones & L. 702), a bequest of a "reasonable sum" was made to trustees, which standing by itself would have been void; but the purpose of the bequest being shown by the additional words "to remunerate them for their trouble," it was referred to the master in chancery to determine the amount. But in *Jubber v. Jubber* (9 Sim. 503), a bequest of a "handsome gratuity to each of my executors," was held to be void for uncertainty.

See, also, *Canedy v. Jones*, 3 Am. Prob. Rep. 32; *Alsup v. Clarke*, 5 Id. 497; *Morford v. Dieffenbacker*, Id. 185.

CHAPMAN *vs.* CHICK.

[81 Maine, 109.].

CONDITIONAL DEVISE.—“REST AND RESIDUE.”

Real estate passes under a clause in a will, giving and devising all the rest and residue of the testator's property and estate of every description, and wherever situate, after the payment of all debts and certain legacies named, unless such construction be prevented by the other parts of the will.

AGREED case. The facts and the material portions of the will appear in the opinion.

Rice & Hall, for the demandants.

W. H. Fogler, for the defendant.

PETERS, C. J. The demandants and defendant are heirs at law of Nathaniel Atwood, deceased, and entitled to any undivided real estate left by him, the demandants to two-thirds and the defendant to one-third thereof. The question is whether any undivided real estate was left by Nathaniel Atwood. He died in 1858, leaving a will, in which, after some minor bequests to distant relatives, he gives his wife Lydia certain personal property and twenty-five hundred dollars outright, and the use and occupation of the homestead for her lifetime or during widowhood. He provides that the twenty-five hundred dollars may be taken by the widow from any of his estate, real or personal, at the appraisal thereof, at her election.

He then gives, among bequests to others, \$500 to a daughter, one of the demandants, and \$250 to a granddaughter, the other demandant, and declares that all his bequests are based upon the assumption that his net estate will amount to the sum of \$4,750. He further declares that, if his estate should turn out to be more than that amount, certain of the bequests, including those to the widow and the persons who are the parties to the present action, shall

be increased (relatively with each other) proportionally with the total estate left by him.

The estate much exceeded the sum named, there being real estate of the appraised value of \$3,335 and personal estate appraised at the value of \$11,197.99, total values being \$14,532.99. So that the widow's portion became enlarged to \$8,036.73, and the portions of the demandants were increased from the sums of \$500 and \$250 to the sums of \$1,600 and \$800, upon the basis that all the estate was converted into or settled as personal property. Each demandant, and all other legatees except the widow, received in money the portions they were thus entitled to. The widow received possession of the balance of the property, consisting of the real estate, \$3,335 in value, about \$5,700 in money or its equivalent. The accounts show a small discrepancy, probably from not noticing a pew, used in common by the heirs, in the calculations.

The demandants now occupy a position of hostility against this construction and settlement of the will, contending that no real estate was devised, or intended to be, beyond the use and occupation of the homestead, and that the bequests were a charge on the personal property only. They admit, however, that the widow might have taken her \$2,500 in real estate, but contend that she never elected to do so.

We think that the will, evidently written by an unskillful hand, and without doubt by the testator, was intended to make a disposition of all the testator's property, real as well as personal. The tests of intention all, or nearly all, point unmistakably that way. There is no residuary clause to catch up anything not otherwise disposed of, and still the mind of the testator was evidently bent upon a purpose of making full and final dispositions. In fact it would not be a misnomer to call the provision increasing certain legacies according to the amount of the estate, a residuary clause. It operates as such. The \$2,500 could be taken from the "estate real or personal," to go "to her and her heirs forever." He provides for a contingency that his

previous advancements to a child might exceed the proportion coming to it "on the final settlement of my (his) estate." The legacies were to increase correspondingly "with my (his) estate." He names men to appraise his "property and estate." He enjoins upon his heirs to see that his estate is amicably settled "according to the provisions of this will." He expresses the hope that his heirs, to all of whom he made bequests, and to some of them he had made advancements, would not be ungrateful, but would be satisfied with his testamentary doings.

It is evident enough that he had in mind no definite distinction between real and personal estate. Nor did his executor have, who rendered his accounts as if there were no distinction, acting on the idea and meaning of the testator.

We have said that the demandants contend that the widow made no election to accept real estate in satisfaction of her portion. We think she did. She went into possession of all the realty and kept possession, at an earlier date by herself, and later by her guardian, until her death in 1882. She enjoyed the rents and profits and paid the taxes and repairs for over a quarter of a century, without opposition or adverse claim from any one. In 1859, she conveyed away a part of the real estate, the homestead, as if her own by a warranty deed. If she did not accept the real estate in satisfaction of her portion, she never received her portion. No sale of the land was made either by heirs or executor. The title to the land came to her by the will.

The general rule as stated by Mr. Bigelow on the point of election, in his last work on estoppel, p. 566, is applicable, and is as follows: "In regard to the question what constitutes an election, it is held in general that one who takes possession of property under a will and holds and manages it for a long time, and especially if he sell the whole or part of it, will be considered as making a binding election to accept that property under the terms of the will." Another principal stated by the same author, at p. 562, hits

at the position upon which the demandants now place their claim. He says: "The most familiar example of this kind of estoppel is found in the case of wills. It is an old rule of equity that one who has taken a beneficial interest under a will, is thereby held to have confirmed and ratified every other part of the will, and he will not be permitted to set up any right or claim of his own, however legal and well founded it may otherwise have been, which would defeat or in any way prevent the full operation of the will." If the real estate was not devised by the will, the demandants have received more than the testator intended they should. We feel strongly the belief that the real estate was conditionally devised, and that the acts of the widow turned it into an absolute and completed devise. It is argued, on the demandants' side, that a circumstance indicating no intention to devise realty, is found in the clause of the will giving use and occupation of the homestead for life or widowhood, and allowing the widow to prevent any division of the property while she lived. That does not militate against the views we have expressed. It is rather in aid of them. If the widow should not elect to do so, then the other provisions would prevail.

The demandants next take the position that, if disentitled under their father to claim two-thirds of the estate demanded, they are still entitled to the same as heirs of their mother, under the claim set up by them that their mother's will, under which the defendant claims the land as a devisee, does not devise any real estate. The mother, Lydia Atwood, after some small bequests, makes in her will this final provision: "I give and devise to my daughter Margaret R. Chick (this defendant), all the rest and residue of my property and estate of every description and wherever situate, after the payment of my debts and the foregoing legacies, to have and to hold the same to her and her heirs forever." This is comprehensive and clear. There can be no doubt the intention was to include all real as well as personal property. Effective expressions are employed. She gives and "devises"—"all the rest and residue"—of

her property and "estate"—of "every description"—"wherever situate"—to hold to her "and her heirs" forever.

There being nothing in other portions of the will expressing or implying anything to the contrary, she must have intended, by a general description, to cover all the property she had in the world after satisfying previous bequests. The word estate may include real as well as personal. The same may be said of the word property. In ancient cases either of the words was supposed to be used in a restricted sense. But in modern construction the popular signification is allowed to prevail. Whether the words are used in the wide or narrow sense must depend on other words associated with them and the general context of the will. The word possessions is allowed the same scope of meaning. (Schoul. Wills, § 510, and cases; *Blaisdell v. Hight*, 69 Maine, 306, and cases.) In *Smyth v. Smyth* (8 Chan. Div. 561), it was held that a freehold estate passed by force of the words, "all the rest and residue." Many kindred cases are there cited and commented upon.

Demandants nonsuit.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

GILPATRICK vs. GLIDDEN.

[81 Maine, 137.]

TRUSTEE IN INVITUM.—TRUSTEE EX-MALEFICIO.

Where a husband devises property to his wife absolutely, upon her assurance that she would hold it for life and devise the remainder to his heirs, the wife takes the property charged with a trust and is, in equity, trustee for the heirs.

APPEAL by defendants from a decree in favor of complainants. The facts as found by the court appear in the opinion.

Baker, Baker & Cornish, for the complainants.

Spear & Olason (*Loring Farr* was with them), for the defendants.

VIRGIN, J. The plaintiffs are the nephews and niece and next of kin of the late Orrin Gilpatrick, and the defendants are the administrator and next of kin of the widow of Orrin, neither of whom left any children.

The plaintiffs seek to establish their title to the proceeds of certain real and personal estate, on the ground that Orrin, having expressed to his wife his intention of leaving all his property to his heirs (plaintiffs) was induced by her to sell and will it to her in form absolute, in sole consequence of his reliance upon her assurance that she would use it during her natural life only and seasonably transfer the remainder to his own heirs; that she did not fulfill her agreement, but died intestate, whereupon the property descended to her heirs instead of his; and that by reason of the premises it became vested in her in trust,—to enforce which trust is the object of this bill.

The presiding justice, who saw and heard all of the witnesses testify, found the facts in favor of the plaintiffs, which finding we should be slow to reverse unless clearly satisfied that it was erroneous. (*Young v. Witham*, 75 Maine, 536.) But after a very careful examination of the stenographer's report of the direct and uncontradicted testimony of the Gilpatrick's life-long, trusted friend and his wife and daughter, in whose family Mrs. G. lived during four years of her widowhood; of their family physician of many years, their business adviser, scrivener and executor of Mr. G.'s will, and the writer at her dictation of what Mrs. G. called a "certification;" of the neighbor who purchased the hay during the last ten years of Mr. G.'s life and of her there-

after,—all disinterested witnesses,—whose testimony of Mr. G.'s frequent expressions to his wife, for months before his decease, of his desire and intention that his property should go to his own heirs; of her final agreement to transfer the remainder thereof "after she was done with it," provided he would give it to her absolutely; of her frequent and freely expressed admissions of such agreement, and of her own construction of it as evidenced by her own acts in executing all the stipulations thereof except the final transfer of the remainder of the property to his heirs, and putting even that in writing signed by her; and of the peculiar instructions of Mr. G. as to the phraseology of the will,—not to use the word "give,"—we are fully satisfied that the justice's finding of facts was correct; and that the following, among other facts, are clearly established:

That Orrin Gilpatrick died in February, 1875, possessed of a farm which came down to him from his paternal grandfather, and of other property all of the value of more than \$9,000, and which he desired to go to his heirs; that his widow died in 1883 leaving property which she had owned in her own right, consisting chiefly of money invested in town securities, amounting to some \$5,000; that they left no children, but a widow of a deceased son; that they always kept their individual property separate; that for several months before his decease, they had frequently discussed the mode of the disposition of his property, and, as she had so much in her own right, he frequently expressed to her his intention of giving his to his own heirs; that, a short time before his death, she finally induced him to give some of the personal property and will the remainder of his estate to her in form absolute upon her assurance that she would only use it, if necessary, during her natural life, pay their daughter-in-law \$500, reconvey certain real estate, the legal title of which he held, to one Glidden, erect a monument in, and keep in repair their private cemetery, and finally, seasonably transfer all that remained to his heirs; that if she had not given her husband such assurance and if he had not confidently relied upon her performance

of it, he would not have executed the will nor given her the personal property; that she promptly performed all of the terms of her agreement except the final transfer of the remainder which she purposely omitted to do, although she had expended but a comparatively small portion of the property during her life.

Nor do we entertain any doubt of the soundness of the law on which the decree appealed from was based, viz.: a constructive trust impressed upon the property and the donee and devisee converted into a trustee *in invitum*, although not so denominated in the paper title, and although the statute expressly provides: "There can be no trust concerning lands . . . unless created or declared by some writing signed by the party or his attorney." (R. S. c. 73, § 11.)

Fraud is infinite in its varieties and forms; and while, as Lord Hardwicke said, "the court very wisely hath never laid down any general rule beyond which it would not go lest other means of avoiding the equity of the court should be found out," *Lawler v. Hooper* (3 Atk. 278), still rules have been established governing certain classes of cases involving the element of fraud,—such as that the fraudulent suppression of a cause of action or of a will is a good answer to the statute of limitations, *Deake Appellant* (80 Maine, 50), that married women and infants shall not take advantage of rules made for their protection to perpetrate fraud (Perry Tr. § 170); and that the statute of frauds shall not be allowed to bar a decree for the specific performance of an oral agreement for the sale and conveyance of land when there has been such a part performance by the party seeking as equity recognizes. (*Pulsifer v. Waterman*, 73 Maine, 233; *Woodbury v. Gardner*, 77 Maine, 68.) And while the precise question involved in the case at bar has never before arisen in this State, the cases last cited are analogous thereto in principle; and the universally recognized ground on which the decisions rest is,—that to permit the statute of frauds to be used as a bar to the compulsory performance of such an agreement thus partly per-

formed, would practically authorize a statute, enacted for the purpose of preventing a fraud, to become the veriest instrument for perpetrating or protecting a fraud.

So for like reason, when one obtains the legal title to real or personal estate, either by will or otherwise, under circumstances which render it unconscientious for him to retain it for his own benefit while in fact another is entitled to it, or to some interest in it, equity secures to the latter his right, not by disregarding the former's legal title, but by imposing on him the duty of holding and using his title for the real beneficiary.

Applying the principle to the facts in this case: Mr. G. was persuaded by his wife to change his intention of leaving his property to his own heirs and to give it to her by reason of her express promise to give the remainder to his heirs, which she omitted to do. His will was regularly probated and the legal title passed thereby to her. His heirs claim that remainder because her conduct operated as a fraud upon her husband as well as upon them, and that by reason thereof she held the property impressed with a trust and she made a trustee. Equity does not interfere with the will. That remains unchallenged. Nor does it assume to set aside the statute of frauds which the defendants invoke. But on account of her conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it or its proceeds for her own exclusive benefit, and imposes on her conscience the obligation to hold all she did not use during her life for the benefit of her husband's heirs (plaintiffs) as the equitable owners thereof, and the additional obligation of perfecting their ownership by will or otherwise. But as she has deceased, equity can reach the personal or the proceeds of both real and personal in the hands of her personal representatives, and any of the real estate in the hands of any subsequent holder who is not a *bona fide* purchaser thereof without notice, holding it relieved of the trust. (Pom. Eq. §§ 431, 1053.)

We do not mean, however, that it is essential to the up-

holding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor, for the great current of English authority during the last two centuries as well as that of this country, holds that, if either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect; and the latter by any words or acts calculated to, and which he knows do in fact cause the testator to believe that the devisee fully assents thereto, and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement,—equity will decree a trust and convert the devisee into a trustee, whether, when he gave his assent, he intended a fraud or not,—the final refusal having the effect of consummating the fraud.

As this is the first case of this kind that has ever arisen in this State, and we have the English and American cases before us, we mention some of them.

Thus, as early as 1678, where a father, being about to change his will lest there might not be assets enough besides the lands settled on his son to pay certain legacies to his daughter, was assured by the son that he would pay them in case of deficiency of assets if the will were not changed,—the son was held to his promise—the chancellor remarking that it was the constant practice of the court to make such decrees on such promises. (*Chamberlaine v. Chamberlaine*, 2 Freem. 34; 2 Ab. Eq. Cas. 43.)

So in 1684, where her son promised the executrix that if she would obtain a new will naming him as executor he would hold it in trust for her—which she did—the lord-keeper decreed the trust notwithstanding the statute of frauds. (*Thynn v. Thynn*, 1 Vern. 296.)

So in 1689, where a copy-holder, intending to leave the greater part of his estate to his godson, was persuaded by his wife, on her promise to carry out his intentions, to

give the whole to her, the court, notwithstanding the statute, enforced the trust. (*Devenish v. Baines*, Ch. Prec. 3.)

In *Oldham v. Litchfield* (2 Vern. 506; 2 Ab. Eq. Cas. 44 [1705]), lands were charged with an annuity, on proof that the testator was prevented from changing them in his will by a promise of payment by the devisee.

Again in 1747, a testatrix having given a bond for £360 to the plaintiff, afterwards by a new will gave it to another on the latter's promise to give it, at her own decease, to the plaintiff, and the performance of the promise was decreed against her representatives, against the interposition of the statute of frauds, Lord Ch. Hardwicke, said: "I know of no case where the court has not decreed it, whether such an undertaking was before the will or after. . . This is not setting up anything in opposition to the will, but taking care that what has been undertaken shall have its effect. A will being ambulatory, if the testatrix has a conversation with a legatee who promises that in consideration of the testator's disposition in her favor she will do an act in favor of a third person, the testatrix lets the will stand, it is very proper the person who undertook to do the act should perform; because I must take it if she had not so promised, the testator would have altered the will." (*Drakeford v. Wilks*, 3 Atk. 539.)

The next year, a residuary legatee, who satisfied the testator that he need not change his will in order to give a nephew £100 for he himself would pay it,—was held trustee, and a trust imposed on the residue of the assets. Lord Ch. Hardwicke, said: "The court will not suffer the statute to protect fraud so as that any one should run away with a benefit not intended. . . There is a breach of promise, but attended also with fraud upon the testator as well as the plaintiff, by representing as if there was no occasion to alter the will." (*Reech v. Kennegal*, 1 Ves. 123; s. c. Amb. 67; 1 Wils. 227.)

So in 1796, instead of changing his will with the avowed intention of increasing the annuity to his wife, the testator told his residuary legatee he would "leave it to his gene-

rosity to pay it as he promised,"—and a trust was imposed on the residue of the assets. The master of the rolls said: "The word 'generosity' cannot be construed to take away the effect of a solemn desire of the testator coupled with the promise of the defendant. The defendant had no intention of fraud at that time, for he desired the testator to make a new will. Leaving it to his 'generosity' is leaving it to his honor and conscience. . . The question is, whether by reposing that trust in the defendant, the testator was not prevented from making a new will. The defendant ought to have told him that, if he did not make a new will, he would not do it. Instead of that he promised to do it, upon which the testator refused to make a new will." (*Barrow v. Greenough*, 3 Ves. 152.)

In 1804, Lord Eldon said: "If a father devises to his youngest son, who promises that if the estate is devised to him he will pay £10,000 to the eldest son, this court would compel the former to discover whether that, passed by parol; and if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000." (*Strickland v. Aldridge*, 9 Ves. 516.)

And the like result is brought about by the silent assent of the devisee to a like proposal of the testator. (*Byrn v. Godfrey*, 4 Ves. 6, 10; *Paine v. Hall*, 18 Ves. 475.)

In 1836, natural children of the testator alleged in substance in their bill that the testator's wife promised, in consideration of his giving to her the whole estate, to leave it to them at her decease, upon the faith of which he did it. Shadwell, V. C., said: "My opinion is that if it were perfectly clear that the state of circumstances took place which the plaintiffs allege, they would be entitled to the relief they ask." (*Podmore v. Gunning*, 7 Sim. 644, 654.)

In 1852, a residuary estate was devised with an oral intimation by the testator to the devisee that he had confidence that he would carry out the testator's intentions, which devisee well knew and assented to,—and the devisee was held a trustee. Lord Justice Turner, V. C., in discussing the question of the devisee's undertaking, said: "The

true test of the answer to this question is this,—would the testator have left the property to the defendant if he had stated, in answer to that question, that he would not carry out the disposition which the testator intended to effect through the medium of the trust. No one can doubt that if the defendant had stated that he would not carry out such intentions, the disposition in his favor would not have been found in the will.” (*Russell v. Jackson*, 10 Hare, 204, 211.)

In the often cited case of *Wallgrave v. Tebbs* (2 K. & J. 321), the joint devisees of real estate denied that they ever knew anything of the testator's intentions till after his decease, but an unsigned letter written by him expressed his confidence in their application of the devised property in accordance with his desires,—Wood, V. C., (then Lord Hatherly) upheld the trust, saying: “Where a person knowing that a testator in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him on the faith of that promise or undertaking, it is in effect a case of trust; and in such case, the court will not allow the devisee to set up the statute of frauds, or rather the statute of wills, by which the statute of frauds is now in this respect superseded; and for this reason, the devisee, by his conduct, has induced the testator to leave him the property, and, as Lord J. Turner says in *Russell v. Jackson* (*supra*), no one can doubt that if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this, the court does not violate the spirit of the statute; but for the same end, namely, the prevention of fraud, it ingrafts the trust on the devise, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it.”

In 1867, in *Jones v. Badley* (L. R. 3 Eq. 635, 652), Lord Romilly, M. R., quoted the foregoing extract entire and de-

clared the law to be therein very "accurately and very comprehensively stated." On the appeal in 1868, Lord Cairns quoted the same extract and pronounced it "the clear and felicitous exposition of the law." (*Jones v. Badley*, 3 Ch. Ap. 362.)

And in 1878, in *Rowbotham v. Dunnnett* (L. R. 8 Ch. Div. 430, 436), Malins, V. C., made the same quotation and pronounced the law "correctly laid down," but dismissed the bill for want of proof.

In 1869, in *McCormick v. Grogan* (L. R. 4 H. L. 82), where under the peculiar circumstances of the case no trust was decreed, some of the language of Lord Westbury in the forepart of his opinion, where he says the court "must see that personal fraud, a *malus animus*, is proved, etc., has sometimes been urged by defendants as requiring more than the authorities already cited; but when it is considered in connection with the facts before him and with his own illustrations in the same opinion, that erroneous view vanishes. After discussing the *rationale* of the principle of dealing with the statute of frauds and of wills, he said: "If an individual on his death-bed, or at any other time, is persuaded by his heir-at-law or his next of kin, to abstain from making a will; or if the same individual having made a will, communicates the disposition to the person on the face of the will benefitted by that disposition, but at the same time says to him that he has a purpose to answer which he has not expressed in the will, but which he depends on the disponent to carry into effect, and the disponent assents to it, either expressly, or by any mode of action which the disponent knows must give to the testator the impression and belief that he fully assents to the request; then, undoubtedly, the heir-at-law in the one case, and the disponent in the other, will be converted into trustees, simply on the principle that an individual shall not be benefitted by his own personal fraud."

Such, in 1873, was the view of Sir James Bacon, V. C., in *Norris v. Frazer* (L. R. 15 Eq. 318, 330), where a husband and wife were devisees of the bulk of the property of

a testator who expressed a desire that an annuity of £300 should be provided for a third person, which the wife testified she promised and the husband assented to. The Vice Chancellor said: "Mr. Swanston has read particularly from Lord Westbury's judgment in *McCormick v. Grogan*, the condition as to what the court has to see proved before it admits any such claim, and he says it must be proved that there was direct personal fraud. . . If the statement made by Mrs. Frazer (one of the devisees) be true, then a more direct, a more distinct personal fraud could not be committed than for Mrs. F. to refuse to perform that promise which she made to the testator on his death-bed."

To the same general purport are *Riordan v. Barron* (10 Ir. Eq. Rep. 645), and *Fleetwood's Case* (15 Ch. Div. 594, 606), decided in 1880. In the latter case, Hall, V. C., after reviewing numerous cases, said: "The testator, at least when his purpose is communicated to, and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise."

Once more in the English courts, in 1884, in *Boye's Case* (26 Ch. Div. 531, 535), in speaking of this class of cases, Kay, J., said: "In these cases the court has compelled discovery and performance of the promise, treating it as a trust binding on the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is presumed that if it had not been for such promise the testator would not have made or would have revoked the gift," citing cases *supra*.

The general doctrine, so long and so thoroughly established in England, has been adopted in several of the States and fully recognized in others.

Thus in 1803, a father was induced to make no will and let his Maryland property descend to his eldest son on the latter's promise to convey the same to his younger brother provided, as was expected, he himself succeeded to certain property in Scotland, which he did subsequently inherit,—

and the court enforced the promise. (*Browne v. Browne*, 1 Harr. & J. Md. 430.)

In *Owing's Case* (1 Bland's Ch. 370; 17 Am. Dec. 311, 317, 338), after stating the English doctrine of enforcing oral promises of devisees, Bland, Ch., said: If in such cases the person beneficially interested "could not have the promise enforced, his loss would be irretrievable. He making the promise would be suffered to frustrate the intention of the deceased, to practice a fraud with perfect impunity; and the statute of frauds, if allowed to apply, would be made to operate for the protection, instead of the prevention of fraud."

In Pennsylvania, in 1832, the testator's brother was made his residuary devisee on his promise to apply the property for the benefit of the testator's illegitimate son, and a trust was decreed. Gibson, C. J., said: "Equity turns the fraudulent procurer of the legal title into a trustee to get at him. . . A mere refusal to perform the trust is, undoubtedly, not enough. . . It seems to be requisite that there should appear to have been an agency, active or passive, in procuring the devise," and, after citing several of the English cases, said: "If the testator was induced by the promise of his brother, much more if by his suggestion, to believe that a devise to him was the most prudent plan of securing the estate to his illegitimate son, it can not be said that a breach of confidence thus reposed in him was intended to be protected by this statute." (*Hoge v. Hoge*, 1 Watts, Pa, 163, 215, 216.) To the same purport are *Jones v. McKee* (3 Pa. St. 496; s. c. 6 Pa. St. 425), and *Church v. Ruland* (64 Pa. St. 432); *Schultz's Ap.* (80 Pa. St. 596).

The English rules have also been adopted and enforced or fully recognized in the following cases: *Williams v. Fitch* (18 N. Y. 546); *O'Hara v. Dudley* (95 N. Y. 403); a full discussion of the whole subject. (*Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 32 N. J. Eq. 734; *Glass v. Hulbert*, 102 Mass. 24, 39, 40; *Kampbell v. Brown*, 129 Mass. 23, 26; *Olliffe v. Wells*, 130 Mass. 221, 224.)

The plaintiffs are the nephews and niece of Orrin Gil-

patrick, children of his two deceased sisters, Thomas Gilpatrick being the only child of one of the sisters, and the other plaintiffs children of the other. If the property should go to them according to the law of descent, Thomas would be entitled to one-half "by right of representation" and the other half to the other plaintiffs equally. (R. S. c. 75 § 1.) Mr. G. invariably spoke of its going to his heirs generally. Mrs. G.'s certificate expressed her desire that "it should be equally divided between his heirs,"—which having been written soon after her husband's decease, may be considered as probably expressing the real understanding between her and her husband. Such a division would also seem equitable.

We are of opinion, therefore, that the bill be sustained, and that the plaintiffs have judgment against the goods and estate of Sarah Gilpatrick in the hands of the administrator on her estate for the sum of \$9,508.06, less the sums paid to Zubra Gilpatrick, the amount paid for erecting the monument and caring for the cemetery, and the commissions paid to the executor,—which amount, if not agreed upon by the parties, to be ascertained by a master.

Decree accordingly.

PETERS, C. J., WALTON, DANFORTH, EMERY and HASKELL, JJ., concurred.

BLOUIN vs. PHANEUF.

[81 Maine 176.]

BEQUEST OF MONEY ACCRUING FROM AN INSURANCE POLICY ON TESTATOR'S LIFE.—ANNUITIES.—TRUSTS.

Whether one whose estate is solvent can dispose by will of money accruing from his life insurance and made by the terms of the policy payable to his legal representatives, *quære*.

A bequest to the testator's wife of the sum of \$50 per month for the support and maintenance of herself and daughter, to be paid monthly from the income of his estate, and on the marriage of the daughter her support to cease, creates a trust in the widow, one-half of the annuity to be applied for her own support, and the other for the support of the daughter during the life of the widow.

BILL IN EQUITY to obtain the construction of a will. The facts appear in the opinion.

G. C. & C. E. Wing, for the complainants.

Frye, Cotton & White, for the respondents.

VIRGIN, J. In addition to some \$12,000 worth of real and personal estate exceeding the debts and charges of administration, the testator left four life policies of insurance,—one for \$5,000 and three for \$2,000 each, all payable to his legal representatives.

One of the questions submitted is: Whether the money derived from the policies goes under the residuary clause to the trustees, or descends under the provisions of R. S. c. 75, § 10, to the testator's widow and only daughter,—the estate being solvent.

Whether a solvent testator can bequeath insurance money to persons other than his widow and child, we have no occasion now to inquire, since we find no such well declared intention as the law requires expressed in the will before us. To be sure there are some indirect, inferential indications that the testator may have supposed that this money formed a part of the fund from which some of his bequests were to be paid; but that is not sufficient. "To dispose of money accruing from life insurance policies in a manner different from that which the law contemplates," said Barrows, J., "the testator must use language directly significant of his intention in this respect; classed by the legislature as this fund is, it is not to be appropriated to the payment of debts, or of any pecuniary legacies couched in general terms merely, even to the widows and children, unless

it is expressly referred to as the fund from which such payment is to be made, and it does not pass by any residuary clause. In short, the testator's intention to change the direction which the law gives to this very peculiar species of property, is not to be inferred from general provisions in his will the fulfillment of which might require the use of such money, but must be explicitly declared." (*Hathaway v. Sherman*, 61 Maine, 466, 476-7.)

We are of opinion, therefore, that the money which accrued from the life policies goes in accordance with the provisions of R. S. c. 75, § 10,—one-third to the widow and the remainder to his daughter.

Another question calls for the construction of the fourth item of the will, the first clause of which is: "I give and bequeath to my beloved wife Angie, for and during the term of her natural life, the sum of \$50 per month for the support and maintenance of herself and my daughter Beatrice, to be paid monthly from the income of my estate, and on the marriage of my said daughter her support to cease."

Did the testator intend to make this annuity an absolute gift to his wife, merely stating the motive therefor to be the support and maintenance of herself and daughter, or did he intend to create a trust and impose an obligation on his wife to appropriate it to the purposes mentioned?

The bequest points out with reasonable certainty the property, the persons in whose behalf it is given, the object and the manner of application,—which are the elements of a trust. (*Malim v. Keighley*, 2 Ves. Jr. 323, 529; *Warren v. Bates*, 98 Mass. 277; Pom. Eq. § 1009.) And we think the true construction of the bequest is found in that numerous class of cases wherein property was given to a parent, or some one standing *in loco parentis*, with various expressions concerning the maintenance of the donee and children. In which cases the courts have generally held that a trust is implied from such and similar language though no express trust is thereby declared, unless other language in the will shall be such as to control it.

Thus, in *Hill Tr.* 65, it is said: "When a gift in a will is expressed to be at the disposal of the donee for herself and children, or towards her support and that of her family . . . the terms employed have been held sufficient to fasten a trust on the conscience of the donee." To the same effect *Perry Tr.* § 117; *Pom. Eq.* § 1012.

In *Jubber v. Jubber* (9 Sim. 503), the bequest was to the testator's wife for the benefit of herself and unmarried children, that they may be comfortably provided for during his wife's life; and the widow and unmarried daughters were held entitled in equal shares to the income during the widow's life. (See, also, *Cole v. Littlefield*, 35 Maine, 439, 445; *Chase v. Chase*, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 340, especially in point; *Bristol v. Austin*, 40 Conn. 438, 443; *Smith v. Bowen*, 35 N. Y. 83.)

Not only does the language adopted, in giving the annuity and defining its object, indicate the testator's intention of his daughter being supported out of it, but that intention is made certain by the provision in the same sentence: "And on the marriage of my said daughter, her support to cease."

The clause that "the bequest to my said wife is to be in lieu of dower" does not impress us as affecting the construction of implied trust, for the sum she would realize from the trust would be more advantageous to her than dower. Nor does the fact that two bequests to his daughter contained in the residuary clause are made expressly "subject to the bequest of \$50 as hereinbefore bequeathed to my said wife" derogate from his intention as we have construed it. That only indicates the desires of a husband that his wife should be comfortably supported out of the sum given or for good cause increased; but also the anxiety of a father for the support of his young daughter; and hence he expressly subjected the bequests which she was to realize after her majority to that which he had deemed necessary during the fourteen years of her minority, unless in the meantime she should marry.

Our opinion, therefore, is that the wife and the daughter

were entitled in equal shares of \$25 each as tenants in common, the mother holding the same in trust. And if the widow waives her provision under the will her share would fall into the residuary fund and the daughter's share remain for her. This does not injuriously affect the daughter as she is residuary legatee.

Decree accordingly.

PETERS, C. J., WALTON, DANFORTH, EMERY and HASKELL, JJ., concurred.

See, also, *Huston v. Read*, 1 Am. Prob. Rep. 501; *Bliven v. Seymour*, 2 Id. 447; *In re Cushing's Will*, 5 Id. 295.

EMERY vs. THE UNION SOCIETY.

[79 Maine, 334.]

DEVISE.—SUBSEQUENT CONVEYANCE.—IMPLIED REVOCATION.

A devise of realty is impliedly revoked by a subsequent conveyance thereof to a person other than the devisee, and the proceeds of such a sale go not to the devisee but fall into the residuum.

BILL IN EQUITY to obtain a construction of a will.

Hale & Hamlin, for the plaintiff.

Holmes & Payson, for the devisee.

Lyman & Libby, for other respondents.

VIRGIN, J. The testator, a resident in this State, executed his will February 3, 1883, died April 23, 1885, and his will was probated the succeeding June.

At the date of his will he had a wife and five nephews and nieces—children of his only sister, residents in Philadelphia. He also owned one moiety of certain real estate in Savannah, Georgia—which was all he owned there—and his nephews named owned the other moiety.

After giving certain specific legacies to various persons, the testator bequeathed and devised to the plaintiff as his trustee, all the residue of his estate, real and personal, upon certain trusts, and authorized him to lease, exchange, sell and convey any or all of his estate for the purpose of executing the provisions of his will.

The trusts specified were: to hold, manage, care for and invest all the residue of his estate, real and personal, according to his best discretion and judgment, pay the annual income thereof to his wife so long as she shall remain his widow; should that not suffice, then the trustee should add thereto, irrespective of any other source of income possessed by her, such a sum out of the principal as would suffice—but that he should not sell the real estate in Savannah “until a strong necessity should arise therefore,” and “to divide so much of his estate as may be remaining upon the death or remarriage of his wife, among his residuary legatees as provided in this will.”

He then bequeathed and devised, upon the death or remarriage of his wife, unto four of his Philadelphia nephews and nieces—Anna M. Wirgman, John M. Durborrow, Richard N. Durborrow and W. F. H. Durborrow—“to hold in equal shares, all his real estate in Savannah.”

He then bequeathed and devised “upon the death or remarriage of his wife, all the residue of his estate, real and personal, to the Union Society of Savannah,” a society duly incorporated for charitable purposes.

After the execution of the will, but before the decease of the testator, his wife died. Thereafter, on July 31, 1884, the testator sold and conveyed his real estate in Savannah for the sum of fifteen thousand dollars—five thousand dollars cash, and two notes of five thousand dollars each, payable in one and two years respectively with interest, se-

cured by a mortgage on the premises. The notes were entrusted by the testator to the husband of one of the devisees for collection, who after the decease of the testator collected the first note and interest on both to July 31, 1885, and remitted the same to the plaintiff as executor, and the second note still remains unpaid in the custody of him to whom it was entrusted.

Not only the surviving nephews and nieces, but the Union Society claim the proceeds of the Savannah property. In their answer the former claimed them and "the interest of the testator therein, by virtue of the mortgage as belonging to them under the will." At the argument the claim is that the trust declared was based on the contingency that his wife would survive the testator, in which event the residuum was to go to the trustee; but that in the event which actually happened of his wife's death preceding his own, the will is silent, and that such property remains undisposed of by the will and is to go according to the rules of inheritance under the law of the State of Georgia.

The testator's domicile having been in this State the construction of his will and its effect depend upon the law here. (*Gilman v. Gilman*, 52 Maine, 165.)

It is settled law that whether searching for the meaning of the whole, or of any particular clause of a will, the intention of the testator as collected from all of its provisions and its general scope is the criterion for its interpretation; and when that intention is ascertained full latitude can be given to it provided it conforms to those settled rules of law which establish and secure the rights of property. (*Anderson v. Parsons*, 4 Maine, 423, 425; *Morton v. Barrett*, 22 Maine, 257; 4 Kent's Com. *535.)

Doubtless the provisions of the will in controversy establishing the trust are based on the testator's expectation that his wife would survive him, and that her death and remarriage referred to a time subsequent to his own decease. It is equally certain that when he executed his will, he intended that the four children of his only sister, mentioned by name therein as devisees, should after his decease have

his moiety of the Savannah real estate, or so much thereof as should not be needed for the maintenance of his widow in "that style and station to which she had been accustomed as his wife." And if the title to that property had been in the testator at his decease probably no question would have arisen in regard to the devisee's title.

But his own sale and conveyance of it after the death of his wife, when it was no longer possibly needed for her support under the will, took it away from the provisions of the will so far as it related to the trust and the devise to his nephews and nieces, and thus revoked *pro tanto* those devises. (*Carter v. Thomas*, 4 Maine, 341; *Hawes v. Humphrey*, 9 Pick. 350, 361; *Webster v. Webster*, 105 Mass. 542.) In *Brydges v. Duchess Chandos* (2 Ves. p. 417), the Chancellor declared this to be a principle of the common law not to be shaken in point of authority. It is the rule laid down in all of the elementary works on Wills and Devises as well as in a multitude of judicated cases.

And the fact that the testator took back a mortgage which passed no title, but simply created a lien upon the property for security of a part of the purchase money, does not prevent the partial revocation. (*Adams v. Winne*, 7 Paige, 97; *Beck v. McGillis*, 9 Barb. 35; *McNaughton v. McNaughton*, 35 N. Y. 201.)

"Conveying a part of the estate upon which the will would otherwise operate," said Weston, J., "indicates a change of purpose in the testator as to that part; and suffering the will to remain uncanceled, evinces that his intention is unchanged with respect to other property bequeathed or devised therein." (*Carter v. Thomas*, *supra*. Kent's Com. [12th ed.] *529.) And implied revocation is recognized in R. S., c. 74, § 3.

The proceeds of the sale of the Savannah property cannot go under the will to the nephews and nieces as devisees, for the will contains no such provision, as did the wills in *Clark v. Packard* (9 Gray, 417); *Atwood v. Weems* (99 U. S. 183); *McNaughton v. McNaughton* (*supra*).

If after the decease of his wife the testator still intend-

ed. that the real estate which he had devised to his nephews and nieces, should go to them, why did he sell and convey it to a stranger—why not convey it to them and thus execute his own will in that respect; and if he intended they should have proceeds of the sale, why did he take the cash and entrust the notes to the husband of one of them for collection, instead of passing them over as their property?

If the proceeds do not go by the will to the devisees of the land, to whom do they go? The nephews and nieces contend that they are not disposed of in any manner by the will, but are intestate property, and hence go by descent to the next of kin; while the Union Society claims that they fall to it through the residuary clause. And this result we think is in accordance with the rules of law. Rules of law are necessarily general, and sometimes operate harshly, but still they are land-marks which must be observed.

It is not to be disputed that a general legatee as distinguished from a particular legatee is entitled to everything which "turns out not to be disposed of." (2 Wms. Ex'rs [Am. ed.], 1567, and notes; 2 Jar. Wills, *762; *Bosley v. Bosley*, 14 How. 391; *Drew v. Wakefield*, 54 Maine, 291; *Thayer v. Wellington*, 9 Allen, 283, 295.) "Because the testator is supposed to take the particular legacy from the residuary legatee only for the sake of the particular legatee; so that upon the failure of the particular intent, the court gives effect to the general intent." (2 Wms. Ex'rs, 1569; 2 Jar. Wills, *762.)

To be sure, the testator may, by the terms of the bequest, narrow the title of the residuary legatee so as to exclude lapsed legacies. (*Dunlap v. Dunlap*, 74 Maine, 402; 2 Wms. Ex'rs [6 Am. ed.], 1571; 2 Jar. Wills, *762; *Bullard v. Goffe*, 20 Pick. 252; *Tindall v. Tindall*, 9 C. E. Gr. 512, and cases cited.) In this will, however, we find no such language as would seem to bring the residuary clause—whereby "upon the death of his wife all the residue of the testator's estate, real and personal," was to go to the Union Society—within this rule.

The result is, the proceeds of the sale of the Savannah real estate falls into the general residuary clause in behalf of the Union Society.

Bill sustained. Costs of both parties to be paid by the executor, including reasonable counsel fees.

PETERS, C. J., WALTON, LIBBEY and HASKELL, JJ., concurred.

Revocation of specific devises or legacies by alteration or disposal of testator's interest therein.—A variation of the testator's title or estate in the thing devised or bequeathed, or a total loss or disposal of his interest therein, will work a revocation, or more properly speaking, an ademption of the bequest; and this will be either *pro tanto* or *in toto* according to the circumstances of the case. Beach on Wills, § 148; Philson v. Moore, 23 Hun, 152.

Thus in Decker v. Decker (Ill. 1887, 19 N. E. Rep. 750), the testator made a specific devise of certain lands and afterwards exchanged them for town lots. The devisee contended that the newly acquired property should pass to him under the devise of the lands for which it was exchanged. But the court decided that the lots constituted a part of the residuary estate.

Even where the property devised was subsequently conveyed to trustees for the benefit of the testator himself, it has been held that the devisee took nothing under the will. Coulson v. Holmes, 5 Sawy. 279.

An exception to the rule is made, however, where the testator does not bequeath the property itself, but directs it to be sold and the proceeds to be paid to the legatee. McNaughton v. McNaughton, 34 N. Y. 201; Warren v. Wigfall, 8 Desaus. Eq. 47; Chambers v. Keerna, 6 Jones Eq. 280; Nool v. Vannoy, 6 Jones Eq. 185. And merely pledging or mortgaging goods or lands specifically bequeathed, does not affect the right of the legatee or devisee therein. He may call upon the executor to redeem them or to pay the mortgage. Ashburner v. Macguire, 2 Bro. C. C. 108.

In a recent New York case (*In re Baby's Will*, [1889], 4 N. Y. Supplement, 182), the testator devised certain real estate to his wife, directing that any liens thereon should be paid from his residuary estate, which was devised to three other persons. He afterwards conveyed to his wife the property which had been devised to her in his will, and subsequently made another will without expressly revoking the first and without referring to the property or to the mortgage thereon. In the second will the residuary estate was differently disposed of. Under these circumstances it was held that the conveyance of the property and the silence of the second

will respecting it and the mortgage thereon, together with the difference between the two wills in other respects, indicated that the testator intended to substitute the second for the first, and that the clause in the former will respecting the liens was revoked by the second.

EMERY, APPELLANT.

[81 Maine, 275.]

REVOCATION BY MARRIAGE.

The will of a *feme sole* is not revoked by her marriage. •

AGREED CASE. It appeared that the testatrix was a widow at the time she executed the will; that she subsequently married, but no children were born of the subsequent marriage; that her second husband deceased before the death of the testatrix; and that at the time of the decease of the testatrix, when said will would take effect, if ever, she was single and unmarried. Will dated Nov. 16, 1878. The Probate Court decreed that said instrument be not approved and allowed as the last will and testament of said deceased.

Frank & Larrabee, for the appellant.

H. B. Virgin, for the contestant.

WALTON, J. The question is whether the common law rule, that the will of a *feme sole* is revoked by her marriage, is now in force in this State. We think it is not. The rule was an outgrowth of the doctrine that the marriage of a *feme sole* destroyed her testamentary capacity. After her marriage she could neither make nor revoke a will. A will

already made, if allowed to remain valid, would make a permanent disposition of her property. This would be contrary to the very essence and nature of a will. It would cease to be ambulatory. It was therefore resolved that the marriage of a *feme sole* should, by operation of law, revoke all existing testamentary dispositions of her property. But, in this State, the marriage of a *feme sole* does not now destroy her testamentary capacity. In this particular the common law is not now in force. It has been abrogated by the legislature. A married woman can now make, or alter, or revoke a will, as fully and as freely as if she were not married. Why, then, should her marriage revoke a pre-existing will? We think it should not. *Cessante ratione legis, cessat ipsa lex*. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself. In England it is now enacted that the marriage of either a man or a woman shall revoke a pre-existing will, unless it is executed under a power of appointment. In New York they have a statute which declares in express terms that the marriage of a woman shall revoke a pre-existing will. In Massachusetts they have a statute which, as construed by the court, has the same effect. Similar statutes exist in several other States. Where such statutes exist, the question we are now considering cannot arise. In other States, where the testamentary laws and the rights and powers of married women are similar to those now existing in this State, it has been held that the marriage of a *feme sole* will not revoke a pre-existing will. It is said in a New Hampshire case that when the incapacity of a married woman to make a will is removed, no reason remains why her will, made before her marriage, should be thereby revoked. (*Morey v. Sohier*, 63 N. H. 507; 2 N. E. Rep. 274; and see *Fellows v. Allen*, 60 N. H. 439; *Webb v. Jones*, 36 N. J. Eq. 163; *Ward's Estate* [Wis.], 35 N. W. R. 731; *Carey's Estate*, 49 Vt. 236.) Our statutes recognize the fact that a will may be revoked by operation of law from a change in the condition or circumstances of the maker (R. S. c. 74, § 3), but they are silent as to what the changes or circumstances are, which shall have

that effect. If the marriage of a *feme sole* now, as formerly, destroyed her testamentary capacity, the change in her condition and circumstances would now, as then, also destroy the validity of an existing will. But such is not now the effect of a marriage. In this State, a *feme covert* can make or revoke a will as freely as a *feme sole*; and the reason no longer exists for holding that the will of a *feme sole* will be revoked by her marriage. It will not be. The decree of the Probate Court holding the contrary was erroneous, and must be reversed.

Decree reversed.

PETERS, C. J., DANFORTH, VIRGIN, EMERY and HASKELL, JJ., concurred.

See, also, Fidelity Trust Company's Appeal, 184, *supra*, and the cross-references thereunder.

COGGIN'S APPEAL.

[124 Pennsylvania State, 10.]

FUTURE ESTATES LIMITED UPON AN ESTATE FOR LIFE.

All future estates limited upon an estate for life, which are not sure to take effect within twenty-one years—with the usual period of gestation added—after the determination of the life estate, are void as within the rule against perpetuities.

APPEAL from a decree of the Orphans' Court of Philadelphia County.

J. Howard Gendell and *John G. Johnson*, for the appellant.

Edwin S. Dixon and *J. B. Townsend*, for the appellees.

PAXSON, C. J. This contention is about the proper construction of the will of the late Thomas Williamson. The testator bequeathed his estate in trust for the benefit of his wife and children. The provisions for the wife are not involved in this case. To each of his children he gave an estate for life. The clause of his will which affects this controversy is as follows :

"And upon and after the decease of my wife, to continue the management as aforesaid, for the benefit of my said four children, and so distribute and pay the whole net income of my residuary estate as that each of them shall receive an equal fourth part thereof in half yearly payments from time to time during his and her respective natural life; and upon the decease of either of my said children, and successively of each of them, then as respects one equal fourth part of the corpus or principal of my residuary estate, to and for the only proper use of his or her child, or all of his or her children, if more than one, who shall have attained, or shall attain, the age of twenty-five years, and the issue of any such who shall have died, or shall die, under that age leaving issue, in equal shares ; so, however, that the issue of any such deceased child, if more than one person, shall take equally among them such share only as their parent would have taken, if living ; but if either of my said children shall die without leaving a child, or issue of a child, him or her surviving, then as respects the share of any residuary estate above limited to the use of his or her child or children, I will and direct shall be held for the equal use and benefit of my other children, and their respective issue, and upon and subject to the trusts and limitations hereinbefore expressed and contained."

By a codicil the testator directed distribution among grandchildren per capita instead of per stirpes, and that as to the children of his daughter Anna W. Stackhouse, no portion of the principal coming to them should be paid during the lifetime of their father, Amos Stackhouse.

The testator left surviving four children, all of whom are yet living, and eleven grandchildren, ten of whom are yet

living, and mostly over twenty-five years of age. One grandchild is deceased without issue. No grandchildren have been born since the testator's death.

The contention of the appellant is that the will and codicil are to be construed as giving an interest to all grandchildren, whether born during the life of the testator or at any time afterwards; that the remainder after the life estate does not vest until the grandchildren are twenty-five years of age respectively and as they or some of them may not attain that age until more than twenty-one years after their parent's death, the gift is within the rule against perpetuities and therefore void; that the testator died intestate as to the remainder after the life interests; the children take it as next of kin to the testator and their life interests and the remainders coalesce.

The auditing judge sustained the view of the appellant and directed distribution of the corpus of the estate to the four children of the testator. Upon exceptions to his adjudication the Orphans' Court reversed the auditing judge, and sustained the trusts in the will. An opinion was delivered by each of the learned judges who differed from the auditing judge, in which, while they agree as to the result, they are not altogether in harmony in the mode of reaching it. It is a satisfaction to know that with the opinions of the learned judges of the Orphans' Court, and the oral and printed arguments of the learned counsel respectively, we have before us about all that can be profitably said on either side.

Where there is any serious doubt whether a legacy is vested or contingent, such doubt should be resolved in favor of vesting. In *Chess's App.* (87 Pa. 362), it was said by Sharswood, J., in delivering the opinion of the court: "The inclination of the courts is always in favor of the vesting of legacies because, in ninety-nine cases out of a hundred, it is the intention of the testator that his bounty should be transmitted to the children or family of the beneficiary, otherwise, indeed, full effect is not given to it." And the question, whether vested or not, is always to be

determined by a fair and reasonable construction of the whole will, and not from any particular expressions. (*Schott's Est.*, 78 Pa. 40; *McArthur v. Scott*, 113 U. S. 340; *Leaming v. Sharatt*, 2 Hare, 14; *Baley v. Bishop*, 6 Ves. 9; *Redfield on Wills*, § 37; *Gray on Perpetuities*, §§ 278, 641; *Randall on Perpetuities*, 85.) On the other hand, we have a rule of property, founded upon the highest considerations of public policy, and too firmly imbedded in our system of jurisprudence to be disturbed save by an act of assembly, which requires that all future estates limited upon a life estate, which are not sure to take effect within twenty-one years and the usual fraction, after the determination of the life estate, are void in their creation. (*Davenport v. Harris*, 3 Gr. 164.) Where the language of a will leaves us in doubt whether this rule has been transgressed, we may well resolve the doubt in favor of vesting, especially when, upon a careful examination of the whole will, we may reasonably infer such to have been the intent of the testator. But where the language employed is not ambiguous and is clearly transgressive of the rule, it is useless to grope after a supposed intent of the testator. The rule itself must be sustained in all its integrity or abandoned. We prefer the former course.

The gift of the remainder is to the grandchildren as a class. The vital question is when did it vest? It was said by Lord Mansfield, in *Baldwin v. Karver* (Cowp. 309), that "the point to be determined in gifts of this character, however general in their terms, is, when does the legacy vest?" In some instances it may be upon the death of the testator, in others upon the death of the first taker, and in yet other instances it may be upon the happening of a contingency. In either event it is the time of vesting which determines who shall take. In a note to *Andrews v. Pattington* (3 Br. C. C. 404), Mr. Eden arranges the cases in three classes, as follows :

1. Where there is simply a general devise to children or other persons as a class, in which it comprehends all persons answering that description at the testator's death.

2. Where there is a previous life estate, in which case all the persons answering the description at the extinction of that life are included.

3. Where the bequest is to children generally, payable at a certain period, as at twenty-one or marriage, in which case all children are let in who come into *esse* before the first child attains the period appointed.

It is a conceded principle that the future interest must vest within a life or lives in being and twenty-one years. It is not sufficient that it may vest. It must vest within that time or the gift is void, void in its creation. Its validity is to be tested by possible and not by actual events. And if the gift is to a class, and it is void as to any of the class, it is void as to all. Authority is scarcely needed for so familiar a proposition. It is sufficient to refer to *Leake v. Robinson* (2 Mer. 363); *Porter v. Fox* (6 Sim. 485); *Blagrove v. Hancock* (16 Sim. 371); *Dodd v. Wake* (8 Sim. 615; *Newman v. Newman* (10 Sim. 51); *Vawdry v. Geddes* (1 Russ. & M. 203); *Williams on Real Property*, 305; *Perry on Trusts*, § 381; *Lewis on Perpetuities*, 456; *Hillyard v. Miller* (10 Pa. 334); *Smith's App.* (88 Pa. 492). The last case is cited upon this point alone. Subsequent reflection has left some doubt in my mind as to the soundness of the ruling in that case upon the main question involved, and as I wrote the opinion I may be allowed to criticise it. Of the principles above referred to there can be no manner of doubt.

We regard it as equally clear that the time when the gift must vest is the death of the life-tenants respectively. There is not a word in the will from which any legal inference can be drawn that the remainder was to vest in the grandchildren at the death of the testator. The language is: "And upon the decease of either one of my said children, and successively of each of them, then as respects one equal fourth part of the corpus or principal of my residuary estate, to and for the only proper use of his or her child, or of all of his or her children," etc. The word "then" in this connection is evidently not used as an adverb of time; it merely means "in that case." But if we treat it as an

adverb of time, it evidently refers to the death of the life-tenant. That is the period the testator is speaking of, and the gift is to all the grandchildren, whether born during the lifetime of the testator or at any time afterwards. A child born the day before the death of the life-tenant would come within the description. Moreover, we are in no doubt that such was the intent of the testator. Why should he cut off all grandchildren born after his death? They would have been as near to him in blood as those born during his life, and we cannot assume without reason, and in the face of the clear language of his will, that he intended to deprive after-born grandchildren of all share of his estate. Moreover, the gift to the grandchildren was to them as a class.

We need not go out of our own State for authority for the proposition that the gift is to all grandchildren living at the death of the life-tenant. In *Minnig v. Batdorff* (5 Pa. 503), it was held: "When there is an intermediate gift to children, those only living at the testator's death will take; but it is now settled that where a particular estate or interest is carved out, with a gift over to the children of the person taking that interest, or of any other person, the limitation will embrace not only the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution." In *Haskins v. Tate* (25 Pa. 249), it was held that a gift to "my son Robert's children, he and them enjoying the benefits of it whilst he lives," gave a life estate to Robert, remainder to his children, and that children born after the death of the testator were entitled to share in the estate. This is in accordance with the rule laid down by the best text writers, and with many of the English and American cases. In the leading case of *Leake v. Robinson* (*supra*), it was said: "Whenever a testator gives to a parent for life, remainder to his children, he does mean to include all the children such parent may at any time have." The doctrine was finally established in the House of Lords in *Boughton v.*

Boughton (1 H. of L. 406). (See also *Hall v. Hall*, 123 Mass. 120; *Fosdick v. Fosdick*, 88 Mass. 21.)

Assuming that the gift is to all the grandchildren, whenever born, we reach the vital question in the case, when does it vest? If it vests at the death of the tenant for life, or within twenty-one years thereafter, it is outside of the rule against perpetuities, and the gift is good. The contention of the appellant is that the gift is contingent or executory, and does not vest in interest until the grandchildren respectively attain the age of twenty-five years.

The age does not merely relate to the time of payment. The gift is to those "who shall have attained or shall attain the age of twenty-five years." It is unnecessary to discuss the long line of cases in which the time of vesting and the time of payment, and the effect of such words as "when," "at," or "if," are discussed. Whenever possible the courts have held that these words refer to the time of payment, in order that the estate may be held to be vested. But in all such cases there has been some previous gift, express or implied, by which the party was to have some benefit from the gift prior to the time fixed for payment; such as the payment of interest, a provision for maintenance, or other matters of a like nature. And it appears to be well settled that unless there be some gift, express or implied, in order to so apply the word, there is no vesting until the time of payment, and the person to receive must be ascertained at that time. "A legacy shall be deemed vested or contingent, just as the time shall have been annexed to the gift or payment of it. And where there is no separate and antecedent gift, which is independent of the direction and time for payment the legacy is contingent." (*Moore v. Smith*, 9 W. 403.) In *Hawkins on Wills*, 241-2, it is said that the nice distinctions respecting vesting and payment do not arise "where the attainment of the given age is made part of the description of the devisee; as if the devise be to all and every the children of A. who shall attain twenty-one, or to such children of A. as shall attain twenty-one, with a gift over on attaining that age. . . . Until

they have attained that age no one completely answers the description which the testator has given of those who are to be devisees under his will; and, therefore, there is no person in whom the estate can vest. . . . It is *prima facie* contingent notwithstanding a gift over in default of a child or children who should fulfill the required condition."

It would seem clear, from the language of the will, that the age of the grandchildren refers not merely to the time of payment or distribution, but is descriptive of the persons who take. A grandchild who dies before arriving at twenty-five takes no interest; nothing which he can dispose of by will or otherwise; nothing which can descend to his heirs. It is true there is a gift over to the issue of a grandchild dying before reaching the specified time, but in such case the issue takes not as heir or next of kin of his parent, but as the devisee of Thomas Williamson. Nor is there any provision for the payment of interest to or for maintenance of a grandchild prior to his or her arriving at the age of twenty-five years. The provision in regard to age is descriptive of the persons who shall take under the will, for no one can tell until that time arrives who will be entitled. The gift to each grandchild is contingent upon his arriving at twenty-five years of age. In our own case of *McBride v. Smyth* (54 Pa. 245), this subject was thoroughly discussed by Mr. Justice Strong, who said: "The first question raised by the bill and answer is, whether the children of Francis McBride, the testator, took under his will a vested interest in the land described at his death, or whether whatever interest any of them took under the will first vested when the youngest child attained the age of twenty-one years? In regard to this we have no doubt. The testator devised all the residue of his estate, including the property described in the bill as sold to the defendant, to trustees, to hold until his youngest child who might then be living should attain the age of twenty-one years, upon certain defined trusts, and upon the youngest of his children who might be living attaining the age of twenty-one years, he

gave, subject to a provision for his widow, all his said (residuary) estate, real, personal, and mixed, to such of his children as might be living at that time, their heirs, etc. This is not a mere postponement of the time of enjoyment. It is a selection of individuals from a class to be donees of a right; a description of persons, not a regulation of the interest given. It is impossible to admit that a gift to such a number of persons as may meet a defined description, is a gift to all the persons, whether they meet the description or not. The rule of legal construction, as well as the testamentary intent in such cases, is well stated in Smith on Executory Interests, 281. It is this: 'Where real or personal estate is devised or bequeathed to such children, or to such child or individuals as shall attain a given age, or the children who shall sustain a certain character, or do a particular act, or be living at a certain time, without any distinct gift to the whole class, preceding such restrictive description, so that the uncertain event forms part of the description of the devisee or legatee, the interest so devised is contingent on account of the person. For, until the age is attained, the character is sustained, or the act is performed, the person is unascertained; there is no person answering the description of the person who is to take as devisee or legatee.' If, then, we are to seek for the intention of the testator in the language of his will, we must conclude he gave no vested interest in his residuary estate to any of his children, that the devises were contingent and became vested, only when the youngest child living attained the age of twenty-one years, in such children as were then in life." This case has been frequently followed; one of the later cases is *Mergenthaler's App.* (15 W. N. 441).

It was urged, however, that a conclusive answer to this line of argument is found in the limitation over to the testator's surviving children upon the death of a child without issue living, that under the authorities the effect of that limitation was to show that the attainment by the grandchildren to the age of twenty-five years was not a condition precedent to the vesting of their interests, but was

simply a designation of the time at which those interests were to be paid ; that the suspending of possession did not affect the integrity of the gift. We may concede the latter part of this proposition. This is not a question of the suspending of the possession, but of the vesting of the interest. If vested, the matter of the suspending of the possession or enjoyment could be easily disposed of. The first part of the proposition is an argument in favor of vesting, but it lacks the conclusive character claimed for it. In a doubtful case it would be persuasive, but where the nature of the interest is clear it is entitled to but little weight. There is abundant authority, some of which has been already cited, that where the attainment of a certain age forms part of the original description of the devisee, the vesting is suspended until the attainment of that age, even though the limitation over is only to take effect in case of his death under that age without issue. (Smith on Executory Interests, § 366.) In *Leak v. Robinson* (*supra*), it was said, referring to the implication from the gift over : " When the vesting is so clearly and expressly postponed, it is in vain to infer from other expressions used without any reference to that object, that the testator did not conceive himself to have postponed the vesting." In *Davenport v. Harris* (3 Gr. 164), there was such a gift over, but the interest was held to be contingent on reaching the prescribed age, and therefore void because too remote. In *Seibert's App.* (13 Pa. 501), there was a gift for life to a daughter, remainder to her children as they arrived at the age of twenty-one, with a gift over in case the daughter did not have any issue living at the time of her death, and it was held contingent, and a granddaughter who died after her mother (the life-tenant) under the prescribed age took nothing under the will. (See, also, *Bull v. Pritchard*, 1 Russ. 213 ; *Hunter v. Judd*, 4 Sim. 555 ; *Judd v. Judd*, 3 Sim 525 ; *Ring v. Hardwicke*, 2 Beav. 352 ; *Pickford v. Brown*, 2 Kay & J. 426 ; *Vaudry v. Geddes*, 1 Russ. & M. 203.)

It was further urged that by the terms of the codicil the gifts to the grandchildren are severable. We are unable to

see the force of this proposition. The provision that they shall take *per capita* does not make them so, nor can we attribute such an effect to the direction that as the grandchildren respectively attain the age at which they become entitled to possession, their shares shall be determined, not by the number who may become so entitled, but by the number of grandchildren then living. The fact remains that the gift is to a class, and not to particular persons of a class, and whether a member of the class can take depends upon the contingency of his or her arriving at the age of twenty-five years.

Measuring this will by its possibilities, not by the facts as they happened to be, it is easy to see that grandchildren may be born within one year before the death of a life-tenant, in which case the gift could not vest within the period fixed by the rule against perpetuities. We must be careful not to strain the law so as to avoid this rule. It is founded upon a sound principle of public policy, and should be rigidly enforced. We are constrained to hold that the gift to the grandchildren is void, and that the estate must be distributed to the children who have the life estates.

This conclusion meets the substantial justice of the case.

The decree is reversed at the costs of the appellees; the adjudication of the auditing judge is affirmed, and it is ordered that distribution be made in accordance therewith.

Mr. Justice STERRETT dissents.

See *Miffin's Appeal*, 264, *supra*, and the cross-references thereunder.

APPEAL OF WINELAND.

[118 Pennsylvania State, 37.]

EXECUTION OF A WILL.—WILL TO BE SIGNED AT THE END THEREOF.

Where the signature of the testator precedes a final clause appointing executors, the will is not signed "at the end thereof" within the meaning of the statute of Pennsylvania, and a will so signed should not be admitted to probate.

APPEAL from a decree of the Orphans' Court of Westmoreland County. The opinion states the case.

H. P. Laird (*John B. Keenan* was with him), for the appellants.

John F. Wentling (*I. E. Lauffer* and *D. A. Miller* were with him), for the appellees.

PAXTON, J. The first assignment of error presents the only question we need discuss. Said assignment is as follows: The court erred in affirming the decree of the register, and in overruling and dismissing the first exception filed before the register, upon the appeal from the decree of the register, which said exception is in the words following, to wit: "The said alleged last will and testament is not signed at the end thereof by the alleged testator, as required by the act of assembly in such case made and provided."

The statute of 1833 enacts that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof," etc.

The will of Benjamin Wineland was not signed by him at the end thereof. It was signed by him, but after the signature were the following words: "I will that Cephas Lash and Henry Wineland be my executors." This was not signed by the testator. After these words came the attestation clause, which was in the usual form.

The register admitted the will to probate and granted letters testamentary to the executors above named.

Upon appeal from the register to the Orphans' Court, the said court reversed the register so far as the granting of letters testamentary was concerned, and ordered letters of administration *cum testamento annexo* to be issued to the parties legally entitled thereto. The learned judge of the Orphans' Court makes no reference in his opinion to the question we are now considering. It deals with other questions in the case which would be important if the will were properly executed.

We think it is not. It cannot be said that the clause appointing the executors is no part of a will. It is an important part though not always essential. It cannot be brushed aside as mere idle words to which no meaning is to be attached. Nor can they be rejected and so much of the will be probated as stands above the signature. As was said by Chief Justice Gibson in *Hays v. Harden* (6 Pa. 413): "It is better, therefore, that an informal addition should operate as a statutory revocation of the whole, than that a plain injunction should be frittered away by exceptions." I am aware that our act of 1833 closely resembles the statute of 1 Vict. c. 26, and that some English authorities seem to sanction the doctrine contended for by the appellees. It is said in 1 Williams' Executors, 69, in commenting upon the above statute of Vict. and its supplement of 15 Vict. c. 24, that "in order to get rid of the objection that the will was not signed at the foot or end thereof, the court in some cases has thought itself justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion. Our act of 1833 as well as the statute of Vict. are in part borrowed from the British statute of frauds, two sections of which have been so evaded by judicial construction as to be practically repealed. We do not propose that the act of 1833 shall meet with the same fate. The legislature have laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial

construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it.

We are of opinion that this paper was not a will within the meaning of the act of 1833, and that it was error to admit it to probate.

The decree is reversed at the costs of the appellee, and it is ordered that the letters of administration *cum testamento* be revoked, and the probate of the will vacated.

Execution of wills.—Position of testator's signature.—Addition of clause appointing executor.—The rule laid down in the principal case is not to be regarded as law. It is contrary both to reason and authority. Counsel for appellees correctly argued that the assignment of error, based upon the fact that the appointing clause followed the testator's signature, was without merit; since the appointment of an executor is not in modern probate law essential to the validity of a will, and the instrument in question would have been a good and valid testament had the latter clause never been written. Even the argument of counsel for appellants was based upon the ground that the appointment of an executor was a material and all important part of the alleged will. But that idea has long been abandoned in England and "never was received on this side the Atlantic." *Leathers v. Greenacre*, 53 Me. 561, 567, 568. Our statutes provide for granting letters of administration *cum testamento annexo* in such cases.

The only case cited by the learned judge who rendered the decision in the principal case was *Hayes v. Harden* (6 Pa. St. 413), in which the expression to the effect that it is better that an informal addition should operate as a revocation of the whole than that a plain injunction of the statute should be frittered away by exceptions, was used with reference to the addition of a clause *stating the reason for making the will*, which might well operate to vary the construction, and hence invalidate the body of the instrument.

The law applicable in such a case as this was correctly stated in *Brady v. McCrosson* (5 Redf. 431), where the Surrogate said: "The second objection is that, because the clause appointing the wife executrix was not signed by the witnesses, therefore the alleged will is void as such. Neither do I deem this objection well taken. The cases cited by the contestant's counsel, to wit, *Sisters of Charity v. Kelly* (87 N. Y. 415); *McGuire v. Kerr* (2 Bradf. 257); and *Heady's Will* (15 Abb. N. S. 211); as well as *Conboy v. Jennings* (1 N. Y. Sup. Ct., Thomp. & C. 622), cited by proponent's counsel, each presents a state of facts materially different from that existing in this case. Here the will was understandingly completed,

and the deceased assented to its correctly expressing his wishes, before it was executed. Then, as an afterthought, the matter of the appointment of an executor arose. If the appointment of the executor had not suggested itself to the mind of the deceased until a week or a month had elapsed, and he had then executed such an unattested writing as this, no one, I think, would claim that thereby the previous duly executed will was rendered void. If this be so, then it strikes me that, if done within a day, or an hour, or any shorter period, it would be equally harmless to destroy it. It was the ancient rule that no paper in the nature of a will would be valid as such unless it contained the appointment of an executor, but such long ceased to be the law. The statute makes provision for the appointment of an administrator with the will annexed, where no executor is named in the will. I think the will properly executed as such, and that it should be admitted to probate."

DICKERSON'S APPEAL.

. [55 Connecticut, 223.]

AFTER-ACQUIRED REALTY.

A will devising all the testator's real estate gives to the devisee any after-acquired estate in land which belonged to the testator at his death.

APPEAL from an order of the Probate Court distributing the estate of the testator. The case is fully stated in the opinion.

L. Warner and *G. Stoddard*, for the appellant.

R. E. De Forest and *E. M. Lees*, for the appellees.

PARDEE, J. Sarah Williams made a will in 1856; she then owned real estate in the towns of Westport and Easton; she subsequently acquired real estate in the towns of Westport and Norwalk. She died in 1885, owning all of this

real estate. By her will she devised in fee to Gershom B. Bradley all her real estate in Westport, the remainder of her real and personal estate to him with other devisees. The Probate Court ordered all of the real estate in the town of Westport owned by the testatrix at the time of her death to be distributed to him.

Two of the heirs-at-law and residuary legatees, and an assignee of another heir-at-law of the testatrix, appealed from so much of the order as distributed to Gershom B. Bradley all the real estate in Westport owned by the testatrix at the time of her death.

The appellee, or defendant, Gershom B. Bradley, moved the Superior Court to dismiss the appeal for reasons as follows :

Because it does not appear from said appeal, or from the record of the Court of Probate in said cause, that the appellants, or any of them, have any interest in or right to prosecute said appeal in this court ; or that the order of distribution complained of by them, and from which they have appealed, is injurious to them, or either of them ; and because it is not alleged, and does not appear, from said appeal or otherwise, that the order of distribution so appealed from is not according to the will of the said Sarah Williams, deceased, and according to law.

The court denied the motion, and upon hearing adjudged that so much of the decree of the Probate Court as ordered all of the real estate owned by the testatrix at the time of her decease in the town of Westport to be set to Gershom B. Bradley be reversed and set aside ; and that all the real estate acquired by the testatrix in the town of Westport after the execution of the will should be distributed as intestate estate.

Gershom B. Bradley, the defendant, appealed to this court for these reasons :

1. That the court erred in refusing to dismiss the appeal upon the motion of the appellee as of record, and for the reasons therein stated.

2. That the court erred in rejecting the evidence offered

to prove that after the making of the will, and after the testatrix acquired the Burns property, she told the said Bradley that she had given to him this Burns property, and that she had given to him all her real estate in the town of Westport, and that she read to him the second clause in the will to show that she had given it to him.

3. In adjudging and decreeing that the real estate situated in Westport, and acquired by the testatrix after the making of the will, did not pass by the will to said Bradley.

4. In finding from the facts proven in the case that all the real estate acquired by the testatrix after the execution of the will is intestate estate, and ordering the same to be distributed as such.

The statute gives the right of appeal from any decree of the Probate Court to any person aggrieved thereby; that is, to any person who will thereby suffer pecuniary injury (Acts of 1885, ch. 10, § 16); but it must appear in his motion to the Probate Court for an appeal that he will thus suffer. Two of the appellants aver that they are heirs-at-law of the testatrix and residuary legatees under her will; another that he is assignee of an heir-at-law; all aver that they are aggrieved by an order of the Probate Court which set to Gershom B. Bradley all of the real estate in the town of Westport owned by the testatrix at the time of her death.

Under our rules of practice in the Probate Court this was a sufficiently explicit averment that if the order complained of had not been passed a portion of the land in Westport would have been set to them. This meets the requirement of the law. The appeal was well taken.

By the common law of this State prior to 1831, and of England prior to 1837, a devise of all real estate did not carry such as the testator acquired after the date of his will. A bequest of all his personal property carried all owned by him at the time of his death. In this State in 1831 a statute provided that "any person having power to dispose of real estate by will or testament, may by such

will or testament devise such real estate not owned by him at the time of making the same but acquired afterwards." In 1848 the following provision was added: "And every devise purporting to be a devise of all the real estate of the testator shall be construed to convey all the real estate belonging to him at his decease, unless it shall clearly appear by the will that he intended otherwise." (Gen. Statutes, p. 368, § 1.) In 1837 in England a statute provided "that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Of the English statute this court said in *Gold v. Judson* (21 Conn. 623), in 1852, as follows: "This statute was passed to get rid of the principle in their law, that a will spoke from its date as to real estate; for by their law no real estate passed by a will but what the testator had when he made his will; but as to his personal property the law of England and of this State now is, and has ever been, otherwise. We have a statute in relation to real estate substantially like the English statute above referred to." Therefore, by these statutes in this State and in England the distinction in this regard between the devise of real estate and the bequest of personal property was abolished; and in the opinion of this court above cited the statutes of the two jurisdictions are of the same import and for the same purpose, and are to receive the same interpretation. Previous to the enactment of our statute, no matter when the testator in fact wrote that he bequeathed all of his personal property, the law said that he so wrote at the last moment of his life; of course all contemplation and possibility even of after-acquired property were barred out. Since the statute the same has been true of a devise of real estate; there can be no contemplation or possibility even of subsequent acquisition. This is true unless when making his will the testator has therein manifested his intention that it shall speak of the day of its execution.

In *Doe v. Walker* (12 M. & W. 591), the testator devised all his land in Great Bowdon; subsequently to the execution of the will he acquired additional land in that parish. It was held that the devisee took the after-acquired land. Speaking of the English statutes the Vice Chancellor said; "These show that one great purpose of the legislature in these enactments was to abolish and put an end to the old law, which prevented a testator from devising real estate which he might acquire by title accruing subsequent to the date of making and executing his will. In that respect the policy of the new wills act seems to have been to assimilate the laws of wills disposing of real estate, so as to accord with the law of wills as to personal property. . . . But it is because the language of wills is so much in the present tense, and used as speaking of the time of the date and making of the will, that the act of parliament has, as to real or personal estate, enlarged their interpretation beyond the present tense, and declared that the will is to speak as if executed immediately before the testator's death."

In *In re Portal & Lamb* (L. R., 30 Ch. Div. 55), Lindley, L. J., said: "If a testator devises all his lands in the parish of B. and then makes a residuary devise of all his other lands, the former devise will carry all other land which he may subsequently acquire in that parish, under section twenty-four of the statute, unless there is an intention to the contrary." In *Smalley v. Smalley* (49 L. J. Reports, N. S. 662), the testator devised "all my freehold land and my two cottages at Clowstop, . . . also my five leasehold houses." Subsequently he acquired other freehold property at Clowstop of which he died possessed. It was held that the devisee took the whole. In *Dickinson v. Dickinson* (L. R. 12 Ch. Div. 22), the testator devised to his son all his leaseholds situated at C., charged with payment of mortgage and annuities. At the date of the will he was possessed of two leaseholds at C., one subject to a mortgage, the other to an annuity. He subsequently acquired other leasehold property at C. It was held that the after-

acquired leasehold passed to the son. In *Cushing v. Aylwin* (12 Met. 169), the testatrix by will made in 1834 devised all her property; in 1840 she acquired land; she died in 1841, not having republished her will. Held that the devisee took the whole. In *Wait v. Belding* (24 Pick. 129), a testator devised to his two sons "the whole of my land and buildings lying and being within the town of Hatfield." He made a codicil afterward which was held to be a republication of the will; and it was also held that other lands acquired by the testator in the interval between the date of the will and the codicil passed to the two sons by the will. It was said by Chief Justice Shaw in delivering judgment: "By the Revised Statutes it is provided that a will shall embrace after-acquired real estate as well as personal, when such is the intent of the testator. These statutes do not affect this will and I only allude to them by way of illustration. Suppose this will had been made after the Revised Statutes, and the question should be whether the estate now in controversy passed by this devise. There seems to be no doubt that it would, the description being general, of all the lands in Hatfield, without limitation as to the time of acquisition." The statute in Massachusetts provides that "any estate, right or interest in lands acquired by the testator after making his will shall pass thereby, in like manner as if possessed at the time of making the will, if such clearly and manifestly appears by the will to have been the intention of the testator." (Gen. Statutes, ch. 92, § 4.) In 1 Redfield on Wills, 385, it is said: "General devises and bequests seem to have been universally construed to include all which it was in the power of the testator to dispose of, which, as the law now stands in most American States, will embrace all the testator's estate, whether real or personal, at the time of his decease."

In 1 Jarman on Wills, 605 (5th Am. from 4th London edition), speaking of the English statute it is said: "By the combined effort of the 3d and 24th sections of the statute it is evident that a general devise of real estate (or of

the testator's real estate in a given county or parish) will operate upon all the property of that description to which the testator may happen to be entitled at his decease." And on page 602, note 4, it is said: "In most of the States there has been enacted some statute more or less perfectly equivalent to that of 1 Vict., c. 26;" and the statute of Connecticut is cited. In 1 Redfield on Wills, 386 (4th ed.), it is said: "Under statutes giving the testator power to dispose of all of his estate, both real and personal, of which he may be possessed at his decease, it has been held that a general devise of all the testator's estate in a particular town or county, or other place, will embrace all of which he dies possessed within those limits."

Moreover, if we should interpret the statute in the narrowest and most literal sense, we shall find that in the will under consideration the testatrix has used apt and sufficient words for the disposition of all her real estate. The testamentary disposition of the whole may be by one devise to one devisee or by several devises or parts to as many devisees; it is only necessary that either the single devise, or the aggregated effect of several, shall exhaust all possible interest in and right to the testator's real estate.

The will in question contains, first, a devise of all the real estate belonging to the testatrix, in the town of Westport, to Gershom B. Bradley; second, a devise to several devisees of the remainder of her real estate—the testamentary disposition of all real estate within specified geographical territory to one, of all else in the world to others. Of course together they are all inclusive; they exhaust all possibilities of ownership. The will literally meets the requirement of the statute that it shall be a devise purporting to be a devise of all the real estate of the testatrix.

And there is neither sentence, nor word even, indicating her intent to stamp the date of execution upon the devise. She has placed no bar to the full operation of the statute. She has allowed it to speak for her as of the moment of her

death. And read as of that moment, doubt as to the construction is impossible. The statute carried forward and continued in force her intent to give to Gershom B. Bradley all the real estate which she owned in Westport from the day of the execution of her will to that of her death, and in effect causes her to republish it on the last named day. After the date of the will she lived many years in presumptive knowledge that the statute would give this effect to what she had written unless she should be at pains to prevent it; and she did not prevent it.

There is error in the judgment of the Superior Court in reversing the decree of the Probate Court appealed from.

In this opinion CARPENTER, LOOMIS and BEARDSLEY, JJ., concurred.

PARK, C. J., (dissenting). While agreeing with my brethren in the general principle which they apply to this case, I think they err in their application of it, and I am unable to arrive at the conclusion which they have reached.

The first rule in the construction of wills is to ascertain if possible, and give effect to, the intent of the testator. All other rules give way before this predominating and decisive one. The principle which the majority of the court invoke is an important one and has its place, but I think must be treated as entirely subordinate to the rule that the testator's intent, where it can be ascertained, shall govern. I consider the present inquiry to be wholly one as to the real intent of the testatrix.

In this case the testatrix gave to her nephew, Gershom B. Bradley, all her real estate in Westport. She then gives all the remainder of her estate, real and personal, to six relatives, of whom Bradley was one. She thus disposed of all her property, leaving no part of it intestate, so that no necessity arises for applying any arbitrary rule to avoid

partial intestacy. The question becomes the simple one—what she intended by her “real estate in Westport.”

It appears from the finding that at the time she made her will, in the year 1856, she owned a homestead and real estate connected with it in Westport, which, after her death, was appraised at \$2,350. It is of course entirely clear that she intended at this time to give to Bradley this real estate and this only. She at that time owned no other real estate except a small quantity in an adjoining town. But in 1860, four years after the will was made, a note for \$3,000 was distributed to her as a part of her father's estate, which note was secured by a mortgage on a farm in Westport. This mortgage in 1877 she foreclosed, and thereby became the owner of the farm which was covered by the mortgage. She died in 1885, having made no change in her will.

It is very clear that it will not do to argue that she deliberately decided to make no change in her will with the intent that this farm should go with her other real estate in Westport to Bradley, for the principle which the majority of the court apply to the case would be equally applicable and controlling if she had died after her father but before his estate had been distributed, or if she had become insane immediately after the will was made and this note and mortgage had come into the hands of her conversator and the foreclosure had been procured by him.

It is a rule of constant application that where the intention of a testator is doubtful the inquiry after it may be helped by considering all the circumstances attending the making of the will; in other words, that the court should place itself precisely in his place and look out as he did upon his property and the objects of his bounty; and the will, for the purposes of determining its meaning, is always read in the light of the then existing facts. Indeed this court held in *Colt v. Colt* (32 Conn., 422), that where parts of a will have been revoked by a codicil, so as in law no longer to exist, and so that the will if regarded as speaking at the time of the testator's death must be entirely silent as

to these discarded clauses, the latter may yet be read with the rest for the purpose of ascertaining the testator's intent in the clauses which he has retained.

It is impossible to doubt that the testatrix really intended to give Bradley the real estate owned by her in Westport in 1856, and that everything else that she had or should ever have should go into her residuary bequest. Why should not this clear intent prevail? Why should any artificial rule be brought in and given a strained application, when its only effect is to defeat this actual intent of the testatrix? It seems clear to me that that intent should prevail and be sustained by the decision of the court.

See, also, *Blaisdell v. Hight*, 1 Am. Prob. Rep. 311, and the note; *Kimball v. Ellison*, Id. 533; *Byrnes v. Baer*, 2 Id. 383, and the note; *Sharpe v. Allen*, Id. 455; *Rizer v. Perry*, 3 Id. 303, and the note; *Briggs v. Briggs*, 5 Id. 439, and the note.

DAVIES vs. DAVIES.

[55 Connecticut, 319.]

LIFE ESTATE WITH REMAINDER TO THE PERSONAL REPRESENTATIVES OF THE LIFE TENANT.

A bequest of a life estate to a son, the remainder to be "distributed or go to his personal representatives who would be entitled to his personal estate according to law," creates an estate which does not vest in the son, and the personal representatives of the son, who are his next of kin, take the remainder under the will of the testator.

SUIT for the construction of a will. The opinion states the case.

C. H. Farnam, for the executors.

J. S. Beach, for the widow of the life tenant.

C. R. Ingersoll, for the next of kin.

PARK, C. J. The ninth article of the will of the late John M. Davies is as follows: "It is my will, and I hereby direct, that four-fifths of the share of any and every of my sons shall be paid to him as soon as it can be conveniently done after my decease; and as to the remaining one-fifth, it is my will and I hereby direct that the same be invested in bonds and mortgages, or, if it shall be thought best by my executrix and executors, in real estate, and kept invested for his use during his life, and that the interest and income therefrom shall be paid to him during his life, and that on his death the same shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law."

The testator left three sons surviving him at the time of his death, who were all of age when the will was made. The share of each in his estate was \$166,666, of which the one-fifth in question in this case is \$33,333.

One of the sons, Cornelius C. Davies, has since died, leaving a will, and a widow, Grace Welch Davies, one of the defendants, but no issue. By the will he gave all his property, both real and personal, to his widow, and constituted her the executrix of his will.

The executors of the will of John M. Davies present to this court the following questions for our advice.

1st. Who are the personal representatives of Cornelius C. Davies intended by the testator in the ninth article of his will?

2d. To whom is it the duty of the plaintiff to deliver the estate now in their hands, under the trust of said ninth article?—to the defendants who are the heirs at law of said John M. Davies and the next of kin of said Cornelius C. Davies, or to the defendant Grace Welch Davies, who is the executrix and sole devisee and legatee under the will of said Cornelius; or to the defendant Grace W. Davies as the widow, and the other defendants as the legal representatives of said Cornelius, in proportions according to the statute of distributions of this State relating to intestate estate?

The ultimate gift of the property in question was made to the "personal representatives" of Cornelius C. Davies, "who would be entitled to his personal estate according to law." We think this description was not intended to describe parties who might represent Cornelius in an official capacity as executors or administrators; neither was it intended for those who might be his devisees or legatees; but was intended to designate his next of kin, who would be entitled to his personal estate by right of consanguinity.

We think it clear that the testator never intended by this description that those should enjoy his bounty who might happen to be Cornelius's executors or administrators, to the exclusion of his children should he leave any surviving him. The improbability of such a gift to those who might not only be strangers to the blood of the testator, but strangers to him personally,—strangers who might come within the description by the accident of appointment by Cornelius as executors of his will, or by the Probate Court as administrators of his estate, would be so great that it would require equivocal language to establish it. As said the Lord Chancellor in *Palin v. Hills* (1 Mylne & K. 470): "If by personal or legal representatives, or executors or administrators, we suppose the testator to mean those whom the legatee might appoint executors, or those to whom the Ecclesiastical Court might give administration, we presume a great improbability, to wit, that he should leave it to the choice of another, or the accident of a grant of administration, to determine in what channel his bounty should flow."

Such a gift would have put it in the power of Cornelius to make a disposition of the property, in effect, to whomsoever he would, for he could select whatever party or parties he might feel disposed to be his executor or executors, and he might make the selection in order that others might have the property, to the exclusion of his children.

All this he might do when no power of appointment has

been given to him directly in the will, and no such power has been given unless intentionally given in the indirect manner suggested. This seems preposterous; and especially so when we consider that the testator granted the power of appointment in the sixth and tenth articles of his will to his widow in one case and to his daughters in the other, and the grants are made in clear and direct terms. The conclusion is irresistible, that if the testator had intended that the sons should have this power, the grant would have been made in equally explicit and direct language.

Again, the cases are numerous, both in England and in this country, where the words "personal or legal representatives," when used by a testator to describe the objects of his bounty, have been construed to mean natural representatives and not legal representatives—representatives in the sense of next of kin, and not representatives in an official or fiduciary capacity.

In the old and leading cases of *Bridge v. Abbott* (3 Bro. C. C. 224), and *Cotton v. Cotton* (2 Beav. 67), the gift was to certain devisees, and in case of the death of either, then to his or her "legal representatives." And in the latter case one of the devisees had died leaving a will. But the master of the rolls held that the next of kin in both cases were entitled to take as the representatives intended by the testator. In *Baines v. Ottey* (1 Mylne & K. 465), the trust was for M. K. for life, with remainder as she should appoint, and in default of appointment in trust to transfer and assign the personal estate to and among such person or persons as would be the personal representatives of M. K. These words of distribution were held sufficient to show that the executors were not intended, but that persons who could take beneficially must be the parties intended. In *Robinson v. Smith* (6 Sim. 47), the trust was for the life of a daughter, and after her decease to pay the trust moneys to such persons as she should by will appoint, and in default of appointment to her "personal representatives." The next of kin were regarded as the persons intended. To the

same effect is *Walter v. Makin* (6 Sim. 148). In *Smith v. Palmer* (7 Hare, 225), and *King v. Cleveland* (4 De G. & J. 477), a direction for a distribution among "legal representatives" was held to mean the next of kin. In *In re Grylls' Trusts* (L. R. 6 Eq. 589), a legacy was given in trust for a married daughter for life, with power of appointment, and in default of appointment to transfer the same to such persons as would be her "personal representatives" in case she had died sole and unmarried. The Vice Chancellor said: "It is a most improbable thing that the testator meant his daughter's executor or administrator to take beneficially." The next of kin took the property. In *Briggs v. Upton* (L. R. 7 Ch. App. 376), the marriage settlement was in trust for the life of the wife, with power of appointment, "and in default of such direction or appointment, then upon trust to pay or transfer the trust moneys unto the legal representatives of the said J. B. in a due course of administration." It was urged that these words, "in due course of administration," indicated the executors as the legal representatives, but the Lord Chancellor said: "I do not think that to be the natural meaning of the words. The natural meaning of the words would be that the trustees were to pay it over to those who in a due course of administration beneficially represented him, and that of course would bring in the statute with reference to the administration of intestate estates."

In this country the English cases, giving to "representatives" the significance of "next of kin," have been generally followed. (2 Redfield on Wills, 78.) Such has been particularly the case in the State of New York, where the will in question was executed, and in reference to whose laws, presumably, it was made.

The case of *Drake v. Pell* (3 Edw. Ch. 270), is a leading one in that State. The bequest was of personal property in trust for the benefit of nine children of the testator, with this provision, "and in case any of my said children shall die after me under the age of twenty-one years, and leaving a child or children him or her surviving, then the share,

portion or interest of the child so dying shall go to the heirs, devisees or legal representatives of the child so dying." One of the sons died a minor and intestate, leaving a widow and two children; and the question was whether the son's administrator took as his legal representative, or his children, as his next of kin. In deciding the question the court say: "And with respect to the words 'legal representatives,' if the property transmitted be personal estate, the persons designated by and answering to this description are those who, by the statute of distributions, are known as the next of kin, and not the executors or administrators of the deceased child. The testator doubtless meant those who should take beneficially to themselves as owners, and not in a mere official or representative capacity in the right of a deceased child." The two grandchildren of the testator were declared to be the parties described to take under the will, and the mother of the children to be entitled to no interest in the property.

The case of *Tillman v. Davis* (95 N. Y. 17), fully and clearly shows that the law of New York excludes the widow and husband from the class of "next of kin" in personal property and from "heirs" in real estate. In that case the testatrix gave property to her executors in trust for the use of her husband during life, and then directed its division into a number of shares, each of which she gave to a beneficiary, and then the will provided that "the heirs of any or either of the foregoing persons who may die before my husband, to take the share which the person or persons so dying would have taken if living." One of the persons died in the lifetime of the husband, leaving a widow, to whom by his will he gave all his property. The court held that the widow took nothing by her husband's devise to her, but that his heirs took by substitution under the original will. It was also held that the word "heirs" was to be construed as "next of kin," which did not include the widow.

The word "representatives" has also been regarded as meaning "next of kin" in *Brokaw v. Hudson's Executors* (27

N. J. Eq., 135). In this case the gift was made to the testator's sister "or to her representatives." The court say: "In a gift of personal property, where the substitutes of the primary legatee are described by the word 'representatives,' those will take who have the right to represent the primary legatee as next of kin under the statute of distributions, and not his executors or administrators."

But we think, aside from the adjudged cases on the subject that the language of the description of the parties who are to take the remainder of the property in question, clearly excludes both the executors and administrators of Cornelius C. Davies and his legatee and widow. The language is: "Shall be distributed and go to the personal representatives of Cornelius C. Davies, who would be entitled to his personal estate according to law." The last words, we think, make it clear that the testator meant by "personal representatives" those who would be entitled to the personal estate of Cornelius by right of consanguinity; that is, who would be entitled by natural right—by relationship—by being next of kin.

But it is said that the title to the one-fifth share of Cornelius C. Davies was vested in him as much as the title to the four-fifths, and consequently that he had the right to dispose of it by will, as he did to his wife.

But John M. Davies, the original testator, disposed of the title to the one-fifth to the next of kin of Cornelius, as we have seen; how then could Cornelius convey it to another party? He had no power of appointment. He had only the interest and income of the one-fifth. This is as clear as language could make it. The testator manifestly intended to put so much of the share of Cornelius beyond the reach of his creditors, in case financial disaster should befall him. There could have been no other object in view in regard to the one-fifth. The testator said in effect in his will—come what may, so much shall be saved from the wreck of Cornelius' estate, for his support, and for the benefit of his next of kin.

We therefore, in answer to the questions propounded

by the executors for our advice, say that the personal representatives of Cornelius C. Davies are his next of kin ; and that the property in question should be delivered to the defendants who are the heirs-at-law of John M. Davies and the next of kin of Cornelius C. Davies.

In this opinion PARDEE and LOOMIS, JJ., concurred.

CARPENTER, J., (dissenting). The testator disposed of the residue of his property as follows : "Seventh. It is my will and I hereby direct that all the rest, residue and remainder of my estate, real and personal, and effects whatsoever, shall be divided in equal portions among my children who shall survive me, and the children of such of them as shall die leaving children, if any, so that each of my children who survive me shall have an equal portion of my estate if all shall survive me, or if any shall have died before my decease without leaving a child or children ; and so that if any of my children shall have died before my decease leaving a child or children, the child or children of each and every one who shall have died before my decease, shall take the share which the father or mother would have taken under this my will, if such father or mother had survived me."

Clearly the leading thought and intent in this section is that his children shall share his property equally. There is no intimation of a contrary intention. He is careful to provide that the issue of each child dying before his own decease shall take the share which the parent would have taken if living. He first divides the property among his children "in equal portions ;" and then to emphasize that intent he repeats : "So that each of my children who survive me shall have an equal portion of my estate."

It will be observed that the gift to each and every one of his children is in precisely the same language. There is no distinction. If one takes a fee, all take a fee, so far as this section is concerned. That will be admitted. The court cannot construe the same language as meaning one

thing in respect to one child, and something different in respect to another. If, therefore, such a construction is to prevail, it must be on account of some other portion of the will which requires it.

The ninth section is as follows: "It is my will, and I hereby direct, that four-fifths of the share of any and every of my sons shall be paid to him as soon as it can be conveniently done after my decease. And as to the remaining one-fifth, it is my will, and I hereby direct, that the same be invested in bonds and mortgages, or, if it shall be thought best by my executrix and executors, in real estate, and kept invested for his use during his life, and that the interest and income therefrom shall be paid to him during his life, and that on his death the same shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law."

The tenth section makes a similar provision for the shares of the daughters, except that the proportions are reversed, one-fifth being payable presently to each daughter, and four-fifths invested for her use during life, and at her decease, and not before, "the said four-fifths of her share shall go to her child or children, if she shall leave any surviving her, share and share alike if more than one, and so that the children of any deceased child shall receive the share that the parent would have been entitled to if living; and if not, that is, if she shall leave no child nor descendant, shall be distributed as her personal estate according to law, or as she shall by her will direct and appoint." And in case any one of his daughters should die after his own decease, and before the payment to her of said one-fifth, or before said four-fifths shall have been invested for her as directed, then the direction is that "so much of such one-fifth or increase as shall not have been actually paid to her, or so much of the amount herein directed to be invested as shall not have been actually invested for her use, shall go and be distributed as the personal estate of such daughter, as in case of intestacy, according to the provi-

sions of the statutes of the State of New York regulating the distribution of the personal estates of intestates, *to the absolute exclusion of any right, claim or interest therein or in any part thereof of any husband as her administrator or otherwise.*"

It will be found that the portion given to each daughter in the seventh section is spoken of as "her share" in his estate no less than seven times in the tenth section. She has the beneficial use of the whole share during her life, the power of disposing of it by will is expressly given her, and, in case she makes no will, it is to be disposed of as her personal estate.

Under such a will I think it will be admitted that each daughter, in effect, takes a fee in the whole portion given to her by the seventh section.

I fail to discover enough in the difference between the ninth and tenth sections to convince me that the testator intended to deal less favorably with the sons than with the daughters. That difference may be accounted for mainly, if not entirely, by his extreme anxiety that each daughter, when married, should take her share as her sole and separate estate and have the power of disposing of it to the "absolute exclusion" of any right in the husband. In case she fails to dispose of it, the provision that it shall be distributed as her personal estate is significant; he thereby recognizes not only that the property vests in the daughter, but also that it is hers, and not her husband's.

No part of the will indicates any want of confidence in the sons. Two of them are made executors, and in the twelfth section the testator speaks as follows: "It is my desire that my three sons should carry on business together in copartnership, believing that they are well constituted with the blessing of God to make a strong and prosperous firm, and in connection with my present partner and friend, Mr. Gopsil, and that they should continue the name of the old firm of John M. Davies & Co."

The suggestion that he intended to place one-fifth of each son's share beyond the hazards of business is hardly

in harmony with other parts of the will. It may be so, but he has not said so, and no such reason for withholding payment of the one-fifth is apparent either on the face of the will or in the attending circumstances. Besides, if it had been his intention to give but a life estate to his sons in any portion of his property, we should expect to find, in a will so intelligently drawn as this is, that intention clearly expressed. We should not expect to find it only by implication, and a rather weak implication at that. Moreover, that construction partially defeats the leading intention of the will by effecting an ultimate unequal distribution of the property.

But the ninth section, aside from the argument drawn from the tenth, may be fairly construed as I contend it should be. Its object is not to devise or bequeath property, but to fix a time for the payment of legacies already given. Hence the testator speaks of "the share of any and every of my sons;" four-fifths of that share is payable at his decease; and on the death of the legatee the other fifth is not in terms given to his personal representatives, but "shall be distributed or go to" them. They are to take, not as purchasers, for that would make the ninth section to some extent repugnant to the seventh. That would limit a remainder upon a fee. That is allowable in a will, the remainder taking effect as an executory devise, when such an intention is clearly expressed. If doubtful, and the language will admit of another rational construction, the latter should be preferred as the true one.

Sometimes the gift of a remainder after a fee will be regarded as repugnant and void. There is not necessarily any repugnancy here, and I contend that the will should not be so construed as to make one; neither should it be so construed as to reduce an estate previously given in fee to a life estate unless such an intention is clear, and I think no such intention appears in this case.

There is no gift or devise in this section except by implication, and such implication need not be resorted to in order to discover the testator's intention, as that intention

is reasonably clear without it. Bearing in mind that the testator is simply providing for the payment of a portion of a legacy previously given, at the death of the legatee, there is no difficulty in perceiving that by "personal representatives" he meant those who should represent or succeed the son in the ownership of the property. That construction avoids repugnancy, does not reduce a fee to a life estate, and gives effect to the testator's intention.

I am aware that there are decisions in England and in this country which hold that a gift to personal representatives is a gift to the next of kin. I have no occasion to controvert that rule; but like all other arbitrary rules it should be sparingly used, and never when it tends to defeat the intention of the testator. But as I construe this will the rule has no application to this case, as here is no gift to personal representatives, but a time is named when a portion of a gift previously given is payable; and as that time is after the death of the legatee, the testator naturally speaks of those who succeed to his rights in property wholly personal as personal representatives.

In this opinion GRANGER, J., concurred.

See, also, *Mickley's Appeal*, 1 Am. Prob. Rep. 615; *Wetter v. Walker*, Id. 519; *Foote v. Saunders*, 2 Id. 73, and the note; *Brannock v. Stocker*, Id. 388, and the note; *Bronson v. Phelps*, 5 Id. 281; *Pinkham v. Blair*, 1 Id. 114.

SCHEIDER vs. MANNING.

[121 Illinois, 376.]

TESTAMENTARY CAPACITY.—INSANE DELUSIONS.

The fact that a man becomes prejudiced against some of his children without sufficient cause, and makes unjust remarks about them not warranted by the facts, does not show that he has insane delusions, or is devoid of testamentary

capacity A testator has a right to leave his property to his children or other relatives in unequal proportions, and, other things being equal, such disposition is valid, whether it be reasonable or unreasonable, just or unjust. The reasonableness or justice or propriety of his will are not questions for the jury to pass upon, except, perhaps, so far as they may be considered as circumstances in determining the testamentary capacity of the testator.

WRIT OF ERROR to the Circuit Court of Lake County.
The opinion states the case.

James S. Murray, for the plaintiffs in error.

Whitney & Upton, and *Robert Hervey*, for the defendants in error.

CRAIG, J. This was a bill in equity, brought by Ellen Schneider and Edward H. McGlennon, to contest the will of Hugh McGlennon, deceased. The will was executed on the 6th day of September, 1879. McGlennon died on the 1st day of January, 1885, and on the 20th day of June, 1885, the will was admitted to probate in the county court of Lake county. The deceased left an estate of the probable value of \$50,000, consisting mainly of real estate situated in Lake county and in the city of Chicago. He owed but few debts. The deceased left as his only surviving heirs, a widow, Ann McGlennon, and three children, Ellen Schneider, Edward H. McGlennon and Sarah F. Hagan. By the terms of the will, the testator, after directing the erection of a family vault and the payment of his debts, devised to his wife all of his personal property, and to his daughter Sarah F. Hagan, the remainder of his estate, except the sum of \$100, which he devised to his daughter Ellen Schneider, and a like sum to his son Edward H. McGlennon. On the 31st day of July, after the will was probated, this bill was filed, in which it is alleged that the said Hugh McGlennon, at the time of executing the will, was not of sound mind and memory, but on the contrary thereof, for a long time prior to and at the time of the said execution, was in a state of partial insanity, and affected with and subject to insane de-

lusions concerning his wife and children. The bill contained other allegations, but it will not be necessary to refer to them here. The widow, the executor and Sarah F. Hagan were made defendants to the bill, and they put in an answer, in which they denied all the material allegations of the bill as to unsoundness of mind and partial insanity of the testator. An issue was formed, as is provided by the statute, which was tried before a jury, and a verdict was rendered in favor of the validity of the will, upon which the court rendered a judgment. To reverse the judgment of the circuit court the complainants sued out this writ of error.

Many witnesses were called, and testified on the trial as to the soundness and unsoundness of the testator's mind at the time the will was executed ; but we have not the time, nor would it serve any useful purpose, to go over the evidence of each witness in detail. We have, however, examined all the evidence introduced on the trial, and while it may be conceded that the testator was eccentric, and entertained strange notions upon some subjects, yet the great preponderance of the evidence showed that he was a man of vigorous mind ; that he had capacity to transact all ordinary business, and was fully competent to make a will. It was not claimed by the contestants that the testator was insane, as that term is ordinarily understood, but the claim was, that at the time the will was executed Hugh McGlennon was laboring under an insane delusion respecting his children, Ellen Schneider and Edward H. McGlennon, and in consequence of such insane delusion he was incompetent to make a will.

Certain declarations made by the testator after 1869, to the effect that the son had threatened to kill the whole family ; that Schneider had tried to induce testator's wife to obtain a divorce and secure large alimony ; that he would break any will the testator might make that did not suit him ; that there was a plot between Schneider, his wife and testator's son, to kill him, and other declarations of a similar character, are relied upon to establish an insane delu-

sion. Whether the testator had sufficient cause for making all or any of the declarations attributed to him, we shall not stop to inquire. There was some evidence introduced tending to prove that he had ground for making the charges, or at least some of them, that were made against the members of his family; but, independent of this, the proponents of the will called over thirty witnesses, some of them prominent business men of the city of Chicago, who had known the testator for many years, business men in the city of Lake Forrest, near where the testator lived for several years, and prominent men in Waukegan, where the testator had transacted business. These witnesses, with great unanimity, state that they had observed no change in the manner of the testator; that they noticed nothing in his conduct or conversation that indicated that he was of unsound mind; that they regarded him perfectly competent to transact ordinary business, and that he was mentally competent to dispose of his property by deed or will.

There may be, and doubtless are, cases where a person may be able to transact some business, and yet be incapable of making a will, on account of an insane delusion which has destroyed the mind on a subject relating to that particular act. Shelford on Lunatics, p. 26, says: "Insane delusion consists in the belief of facts which no rational person would have believed. This delusion may sometimes exist on one or two particular subjects, though generally there are other concomitant circumstances, such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion and to establish its insane character. The absence or presence of delusion, so understood, forms the true and only test or criterion of absent or present insanity. In short, delusion, in that sense of it, and insanity, seem to be almost, if not altogether, convertible terms."

In view of the law thus declared on the question under consideration, a bare reference to the evidence of the witnesses introduced in support of the will, is enough to show

clearly that the testator was not laboring under an insane delusion, as that term is described by the author. The witnesses had known the testator for many years. They frequently met him and talked with him in regard to business and the various affairs of life, and in their conversation and constant intercourse with him no trace of a deranged mind on any subject is detected. Whatever doubt, therefore, may have been raised in the minds of the jury by the evidence of the contestants of the will, in regard to the mental capacity of the testator to make a will, was overcome and removed by this evidence. A man may become prejudiced against some of his children, and that, too, without proper foundation; and because he may make unjust remarks against them,—remarks not warranted by the facts,—it does not follow that he has insane delusions, or that he is devoid of testamentary capacity. If such was the rule, but few wills would be able to stand the test where an unequal distribution of property has been made by a testator among children. A man has the right to dispose of his property by will in such manner as he may desire, and the fact that he may give more to one child than another, does not affect the validity of a will, or prove that the testator is incompetent to make a will.

It is also claimed that instruction No. 5, given in behalf of defendants, is erroneous. It is as follows:

“The court instructs the jury, that insanity or unsoundness of mind, within the meaning of the law in this case, is a disease of the brain, affecting the mind to such an extent as to destroy a man’s capacity to attend to his ordinary business, or to know and understand the business he was engaged in when making a will. And unless the jury believe, from the evidence, that Hugh McGlennon’s brain was diseased to such an extent that he did not have mind and memory sufficient to enable him to transact his ordinary business, such as renting his real estate, settling accounts, buying and selling property, and to know and understand the business he was engaged in at the time he made the

will in dispute, you should find that said will is the will of said Hugh McGlennon."

Where a bill has been filed to impeach a will, on the ground that the testator was of unsound mind at the time the will was executed, the doctrine announced in the instruction has been approved in a number of cases decided by this court. In *Meeker v. Meeker* (75 Ill. 262), it is said: "It is a rule of law, that a person who is capable of transacting ordinary business is also capable of making a valid will. It is not required that he shall possess a higher capacity for that than for the transaction of the ordinary affairs of business. A man capable of buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, must usually be regarded as capable of making a valid disposition of his property by will." The same doctrine was announced in *Yoe v. McCord* (74 Ill. 34); *Brown v. Riffin* (94 Id. 564); *Carpenter v. Calvert* (83 Id. 62); *Turk v. Newell* (62 Id. 196); and *Freeman v. Easley* (117 Id. 317). In the last case cited, after referring to *Meeker v. Meeker* with approval, it is said: "A test usually recognized is, the party must be capable of acting rationally in the ordinary affairs of life, so that he may comprehend what disposition he may wish to make of his property, and be able to select the subjects of his bounty. Nothing more is required, and so the authorities in this State uniformly hold." The rule announced by this court is in full accord with the most approved text writers on the subject. (See 1 Redfield on Wills, 123, 124.)

But it is said that the principal issue made by the contestants was, that the testator, at the time he executed the will, was laboring under insane delusions concerning the natural objects of his bounty, and, as applied to that issue, the instruction does not correctly state the law. In support of this position, we are referred to *American Bible Society v. Price* (115 Ill. 631). Had there been no other instructions in any manner limiting the rule announced in this instruction, in regard to insane delusions, it may be that instruction No. 5 might have been misleading. But

such was not the case. In the sixth instruction the jury were told, that if the testator had an insane delusion on the subject of his family, yet if they find, from the evidence, that at the time he made the will he had sufficient mind and memory to understand ordinary business, and knew and understood the business he was engaged in when he made the will, they should find the will to be valid. Again, in contestant's instructions 2 and 3, the jury were so fully and clearly instructed in regard to insane delusions, that they could not have been misled by the instruction complained of.

No. 3 is also claimed to be erroneous. The instruction, in substance, declares that the owner of property who has capacity to attend to ordinary business, has the right to dispose of it by deed or will, as he may choose, and that it requires no greater mental capacity to make a valid will than to make a valid deed; that an owner of property has a right to leave his property to his children, or other relatives, in unequal proportions, and such disposition is valid, whether it be reasonable or unreasonable, just or unjust; and the reasonableness or justice or propriety of the will are not questions for the jury to pass upon. The law is well settled that any person competent to make a will may dispose of his property in such manner, not inconsistent with the law of the land, as his judgment may dictate. He is under no legal obligation to divide it equally among his children, but may cut off one or all, and devise to a stranger; and, as a general rule, the justice or propriety of the will is not a question for the jury to pass upon. This, as we understand it, is the substance of the charge complained of. There are authorities which hold that apparent inequality or unreasonableness in a testamentary disposition of property may be considered as a circumstance on the question of testamentary capacity,—for example, *Lamb v. Lamb* (105 Ind. 457); *Denison's Appeal* (39 Conn. 405); *Bilner v. Bilner* (65 Pa. St. 362); *Kevill v. Kevill* (2 Bush. 614); *Kimball v. Cuddy* (117 Ill. 217). But we do not understand that the instruction conflicts with this rule.

Had the jury been told that injustice or inequality of disposition was not a circumstance to be considered, a different question might arise; but such was not the instruction, as we understand it.

The fourth instruction is objected to. The substance of this charge is, that eccentricities or peculiarities will not necessarily render a man incapable of making a will. There was evidence before the jury that the testator was eccentric and peculiar, and if such traits of character did not disqualify, we see no good reason why the jury might not be so instructed. An eccentric man or a peculiar man is not disqualified from selling or disposing of his property by devise. If such was the case, many people might be deprived of that right, as but few men can be found who are not in some respects peculiar.

After several of the witnesses had testified in regard to the condition of the testator's mind, his capacity for transacting business, from their acquaintance and personal knowledge of him, they were then asked the following question: "Had he the mental capacity to dispose of his property by will or deed?" The question was objected to, but the objection was overruled, and the witness allowed to answer. The decision of the court on the question is relied upon as error. The authorities are not uniform on this question, but we think the weight of authority is against the ruling of the court. (*Gibson v. Gibson*, 9 Yerg. [Tenn.] 332; *White v. Baily*, 10 Mich. 155; *Kemptry v. McGinnis*, 21 Id. 123; *Farrel v. Brennan*, 32 Mo. 328; *Fairchild v. Bascom*, 35 Vt. 398.) The witness had the right to state any fact he knew in relation to the capacity of the testator to transact business, and all he knew in regard to the vigor or strength of his mental powers. But whether he had the mental capacity to dispose of his property by will or deed was a question for the jury to determine, from the facts proven before them. But while the court erred in allowing the question to be answered, it was not an error of sufficient magnitude to reverse the judgment. The witness had stated all the facts upon which he based his opinion,

to the jury, and his mere opinion could carry with it no additional weight. We do not think, therefore, the complainants were in the least injured by the evidence.

Dr. Hays, a medical expert, having been called as a witness by the defendants, testified that he had heard all the evidence introduced by the contestants. The witness was then asked the following question: "Having heard that evidence on the part of the contestants, state whether or not, in your opinion, from a medical standpoint, from that evidence, Hugh McGlennon was of sound or unsound mind on September 6, 1879." The question was objected to, the objection overruled, and the complainants excepted. We think the evidence was admissible. Greenleaf on Evidence, vol. 1, sec. 440, after stating that the opinions of witness are, in general, not evidence, says: "On questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted as to the cause of disease or of death, or the consequence of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances, and as to other subjects of professional skill; and such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial." (*Gilman v. Town of Stafford*, 50 Vt. 723; *Webb v. State*, 9 Texas Ct. of App. 490; *Woodbury v. Obear*, 7 Gray, 467.)

A hypothetical question was also asked the witness, which is claimed to be erroneous. But without entering upon a discussion of the question, we think it complied substantially with the rules of evidence which govern the subject. Indeed, after a careful examination of the entire record, we find no substantial error in it, and the decree will be affirmed.

Decree affirmed.

See, also, *Rice v. Rice*, 3 Am. Prob. Rep. 128, and the note; *Potter v. Baldwin*, Id. 292; *Yardley v. Cuthbertson*, 5 Id. 562, and the note; *Es-*

tate of Johnson, 2 Id. 524, and the note; Brown v. Riggin, 1 Id. 288; Kingsbury v. Whitaker, Id. 245; Will of Cole, Id. 339; Key v. Holloway, Id. 360; Young v. Ridenbaugh, Id. 378; Cuthbertson's Appeal, 2 Id. 54; Chrisman v. Chrisman, *supra*, 156, and the note.

WALKER vs. PRITCHARD.

[121 Illinois, 221.]

DEVISE OF LIFE ESTATE WITH POWER OF DISPOSITION.

A testator devised certain land to his wife, giving her full power and authority to sell and convey the title thereof at any time and convert the avails to her own use and benefit, and his will then proceeded:—"I further bequeath during her natural lifetime one span of horses," and all other items not otherwise disposed of, "during her natural life as aforesaid," and at her death "all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may remain unexpended, to my two sons (naming them), and to their heirs and assigns forever." *Held*, that the widow took only a life estate, with a power of disposition, and that the sons took the remainder, or such part as remained undisposed of at her death and could be identified. A power of sale superadded to a life estate does not enlarge it to a fee.

APPEAL from a judgment of the Appellate Court for the second district. The facts appear in the opinion.

George C. Christian, Luther Lowell, and Duane C. Carnes, for the appellant.

H. A. Jones and A. B. Coon, for the appellees.

SCHOLFIELD, J. *First*—We held in *Cheney, et al. v. Teese, et al.* (113 Ill. 444), that although a freehold may have been involved in the litigation, and the decree thereon rendered, yet where no objection is made to that part of the decree, an appeal from another part of the same decree, having no

relation to the question of the freehold, but merely settling a matter of account, will not lie from the circuit court to this court, but must be taken to the Appellate Court. And so, if this appeal had been brought directly to this court, appellant would have been entitled to have had it dismissed, and, therefore, if the motion in the Appellate Court to dismiss had been allowed, it would have been within the power of appellant to have prevented an appeal to any court. The theory of the decision in *Cheney, et al. v. Teece, et al.* (*supra*), is, that where different parts of a decree relate to matters wholly independent of each other, so that the decision as to one part has no influence or bearing upon the decision as to the other part, they are severable, and in effect distinct decrees, and an appeal may, consequently, be made from either part without affecting the record as to the other part. When such an appeal is taken, manifestly the question of jurisdiction must be determined by the question affected by the decree, as was there held, and it would inevitably follow that cross-errors could not be assigned as to the part of the decree not brought before the court by the appeal.

Second—The second clause of the will of Reuben Pritchard is as follows :

"Second. I give, devise and bequeath to my beloved wife, Elotia Pritchard, in lieu of her dower, certain lots of land being in the county of DeKalb and State of Illinois, and described as lots two, the north-east quarter and east half lots one and two, the north-west quarter of section four in township (38) north of range (4) east, containing 168 and 20-100 of acres of land according to government survey. I appoint and fully authorize my wife, Elotia Pritchard, with full power and authority to sell and convey the title to the above described lands at any time and convert the avails to her own use and benefit, and also I further bequeath during her natural lifetime one span of horses—one an iron gray and one a bright bay, and two colts, one black and one bay, coming three years old, three cows, and all the household furniture now by me owned, and all the

farming tools that are used and by me owned on the premises that I now occupy, and other items not particularly named and disposed of in this will, during her natural life as aforesaid, and at the death of my said wife all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may remain unexpended, to my two sons, Reuben M. Pritchard and Ethan A. Pritchard, and to their heirs and assigns forever."

The Appellate Court, per Baker, J., speaking of this clause said :

"It is plain that by the terms of this bequest Elotia Pritchard was made legatee for life of the specific live stock and chattel property mentioned therein, with remainder over to her step-sons. It was provided, however, that the sons should take, as such remainder-men, not the whole of the property absolutely, but it, or such of it as should be unexpended at the death of the life-tenant. None of the chattels left by Elotia Pritchard at her decease, and inventoried by her administrator, are identified as being the precise or specific articles of property that she took under the will as legatee for life. A life estate in personal property gives the donee a right to consume such articles as can not be enjoyed without consuming them, and to wear out by use such as can not be used without wearing out. The fifty bushels of wheat and one hundred bushels of oats, were evidently intended by the testator for consumption on the farm, and the horses, cows, wagons, harness, farming utensils and lumber, intended for use on the farm, and presumably, during the fifteen years that elapsed between the death of the testator and that of the legatee for life, the articles mentioned either died or were worn out, or used and consumed for legitimate farm purposes. It makes no difference that cows, heifers, steers and calves appear in the inventory made by the administrator, for they are not shown to be the domestic animals that were given for life, or the increase from them. In the inventory of the estate of Reuben Pritchard, promissory notes and money on hand, amounting in the aggregate to \$850, are mentioned; but

the first clause of his will directed that his funeral expenses and just debts should be paid, and we are unable to say, in the absence of proof, that there is any presumption that these notes and moneys, which were not specifically given by the will, were not used by the executors in payment of funeral expenses, debts, and cost of administration, but went to the legatee for life, under the words, 'and other items not particularly named and disposed of in this will,' as a residuary bequest. But even if such were the case, we think it is manifest, from a consideration of the various provisions of the will and in the light of the surrounding circumstances, that it was the intention of the testator that his widow should convert to her own use, and consume, if she deemed she had occasion so to do, the residue of moneys in her possession, whether on hand at his death or realized from the notes, and that the remainder-men should only have such portion thereof, if any, as remained unexpended at the time of her death. In our opinion, the decree of the court upon this part of the case should likewise be affirmed.

"The more important question in the case is with reference to the devise of the 168 acres of land. The doctrine is, that a will may create a life estate, with power to sell and convey the fee, and limit a remainder after the termination of the life estate. (*Kaufman v. Breckenridge* 117 Ill. 305, and cases there cited.) In *Hamlin v. United States Express Co.* (107 Ill. 443), the Supreme Court laid down certain principal rules of construction as applicable to such cases as this, and cited a number of prior decisions of the court as authority therefor. These principal rules are: 'The intention of the testator, if not inconsistent with the rules of law, shall govern; and this intention is to be ascertained from the whole will and all its parts, taken together. Every clause and provision, if possible, should have effect given to it according to the intention of the maker. A later clause of a will, when repugnant to a former provision, is to be considered as intending to modify or abrogate the former.' In the *Hamlin* case the first clause of the will, by its express

terms, gave the real estate with full power to hold, use, enjoy or dispose of it, and convey it, by absolute conveyance, in fee simple; and this language, considered by itself, would vest an estate in fee in the donee. The only words found in the will to qualify the language so used, and indicate the intention of the testator was to limit and restrict such language so that the effect would be to vest in the donee, not the title in fee, but an estate for life with power to dispose of and convey the fee, and with remainder for the benefit of specific legatees, are those that occur in the subsequent clause of the will, and create the remainder by directing the limitation over in respect to all real estate not conveyed by the first donee. The decision in the *Hamlin case* is cited with approval in *Kaufman v. Breckinridge* (above). See, also, in *Bergan v. Cahill* (55 Ill. 160), and *Friedman v. Steiner* (107 Id. 125), the qualification to reduce the fee that is apparently donated, to an estate for life, is found only in the limitation clause of the will. The primary consideration is an ascertainment of the intention of the testator, and it is wholly immaterial in what part of the will the words are found which indicate such intention. Nor do we deem it essential to the creation of a life estate, that the intention so to do should be expressed in any set form of words, and all that is required in order to show such an estate, and not the fee simple title, is given the donee, is that it shall clearly appear from a consideration of all the various clauses and provisions of the will, when taken and compared together, that it was the testamentary intention the donee should have a life estate.

"We are of opinion the will in question gave to Elotia Pritchard a life estate in the 168 acres of land, with power to sell and convey the same in fee, and convert the proceeds and avails thereof to her own use and benefit, with remainder in the land, if unsold under the power, and if sold, then the remainder in such portions of the proceeds and avails as remained unexpended at time of the death of the donee, to the two sons of the testator. Both the land and personal property are given by one and the same general

clause of the will, and at its close the testator says: 'During her natural life, as aforesaid, and at the death of my said wife, all the property hereby devised or bequeathed to her, as aforesaid, or so much thereof as may remain unexpended, to my two sons.' It would seem the words, 'all the property hereby devised or bequeathed,' included both the real estate and the chattels mentioned in that clause of the will. If the testator intended, by the first sentence of the clause, to invest his wife with the title in fee, then the donation of the power to sell and convey was wholly inoperative and useless. So, also, was the power to convert the avails of the land, as she would be invested with that right as the owner of the fee simple title. One of the rules of construction in the interpretation of wills is, to give effect, vitality and force, if possible, to each and all of its provisions. So, also, the limitation upon the use to which the avails of the land were to be applied,—that her power should not extend to any disposition she might think fit to make of the proceeds derived from the sale, but that she should have authority only to 'convert the avails to her own use and benefit,'—is inconsistent with the idea he regarded her in the light of an owner in fee simple absolute, and is an indication it was his intention that the proceeds not consumed for her own use and benefit, but remaining 'unexpended' at her death, should vest in his two sons, as provided in the latter part of the clause."

The argument of counsel for appellant assumes that the language employed in this will clearly vests a fee in Elotia, for there can be no question that a power of sale, superadded to a life estate, does not enlarge it to a fee. (2 Redfield on Wills [2d ed.], p. 344, sec. 52.) This assumption of counsel, in our opinion, results from a misapprehension. The language of the will is: "I give, devise and bequeath to my beloved wife, Elotia Pritchard, in lieu of dower, certain lots of land,"—and the lands are then described. No words follow the description of the lands, declaring what estate is devised. This, at common law, only gave a life estate in the land. (2 Redfield on Wills [2d ed.], p. 321,

sec. 20; 2 Jarman on Wills [5th ed.], 267; 4 Kent's Com. 267.) But our statute provides, that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law." (Rev. Stat. 1874, p. 275, sec. 13.) So it is a question of construction from the entire instrument what estate is given. In the absence of limiting or qualifying words, it is a fee, but with such words, the instrument is to be construed so as to give effect to the intention of the testator, as manifested by the phraseology of the entire instrument, and hence arbitrary rules of common law, applicable to cases where, before the enactment of the statute, a fee was clearly technically given, are not pertinent, for in those cases, there is no question, in the first instance, what estate is given, but it is,—a fee being given,—what effect have subsequent words of limitation, etc. Here, there being words of qualification and restriction, they are, under the statute, to be considered in determining, in the first instance, whether a life estate or a fee was intended.

The 28th section of chapter 26, 1 Victoria,—adopted in 1837,—is somewhat analogous to this section, but we think less full and clear in expressing the idea than is our statute, that where there is a general gift, and in the same instrument qualifying or limiting words, the whole instrument is to be read and considered together in determining what estate was granted.

Jarman, in his work on Wills (5th ed.), vol. 2, p. 288, says, speaking of that section: "Now an estate in fee will pass by such a devise (i. e., a general one), unless a contrary intention shall appear by the will. The *onus probandi* (so to speak) will, under the new law, lie on those who contend for the restricted construction, and will not be discharged by showing that another devise in the will contains formal words of limitation, or that a special power of

appointment is, in terms, given to the devisee, though if the same land be given, in one part of the will, to A., and in another to B., the presence of words of limitation in the latter gift, and their absence in the former, are material to correct the apparent contradiction, and to show that the testator meant a gift to A. for life, with remainder to B. in fee."

Theobald, in his treatise on Wills (published in 1876), page 484, says: "But, as a rule, when there is a gift to A., indefinitely, followed by a gift at his decease, A. will take only a life interest."

In *Constable v. Bull* (3 DeG. & S. 411), which was decided in 1849, the language was: "I give, devise and bequeath unto my dear wife, Mary Ann Constable, all and every my estate and effects, goods, chattels, houses, lands, moneys, etc., and wheresoever the same may be at the time of my decease, for her sole, separate use and benefit. I further give, will and direct that at the decease of my said wife, whatever remains of my said estate and effects shall go to and be equally divided, share and share alike, between the following persons hereinafter named," etc. It was held that this gave only a life estate to the widow.

In the case of *Bibbens v. Potter* (10 Law Rep. [Ch. Div.] 733, decided in 1879), Emily Bibbens, by her will, gave her sister, Ann Maria Bibbens, "all her estate and effects, both real and personal," for her own use and benefit, absolutely. By a codicil, made afterwards, and directed to be taken as a part of her will, she added: "After the death of my sister, Ann Maria Bibbens, I give, devise and bequeath all property of mine which may then be remaining to," etc. The Vice Chancellor held, that, construing the will and codicil together, the gift to Ann Maria was cut down to a life estate.

In *re Stringer's Estate*, and *Shaw v. Jones & Ford* (6 Law [Ch. Div.], 1), decided in 1874, the will of Thomas Stringer used this language: "First, I give and bequeath unto my brother, John Stringer, all my real and personal estate and effects whatsoever and wheresoever, with full

power and authority for him to give, sell and dispose thereof, or any part thereof, to such person or persons, and for such purposes, as he shall think fit, by any deed or deeds, writing or writings, or by his last will and testament, in writing, already executed or hereafter to be executed by him, or otherwise; and I do hereby name and appoint him the sole executor of this my will; but provided he shall not dispose of my said real and personal estate, or any part thereof, as aforesaid, I do hereby give, devise and bequeath my said real and personal estate, or such part or parts thereof as he shall not dispose of, in the manner following." The testator then devises all his real estate to certain named parties, and gives certain specific legacies of his personal estate. This, it will be noted, gives every right of disposition and control of the property that an owner in fee has, and goes much beyond the power in the present case, which does not include the right to give or will the property. John Stringer died before the testator. The Master of the Rolls held that the devise over was void, because repugnant to the devise to John Stringer. This was reversed by the Court of Appeals, that court holding that the will gave John Stringer a life estate only. In the first part of the opinion of James, L. J., he seems to think that the death of John Stringer before the testator, makes the case different from what it would have been had he survived him. But the decision is not put on that ground, but upon the construction of the entire will. He says: "But it appears to me, that upon the true meaning of this will, taking, as we are bound to take, not only this particular clause, but every part of the will, into consideration, the testator has, in the plainest manner possible, short of express words, provided for the event of his brother's death. In the first place, I should say that I think that the better construction of this will is, that the testator only made his brother tenant for life, because you have not only got those words,—that is to say, the gift and power superadded, and a gift over, in terms, if he does not execute that power,—but you have subsequent gifts, which would seem to be

wholly inconsistent with there being an absolute gift, in the first place, to his brother. First of all, there is an appointment of executors. It seems to me to be wholly irreconcilable, upon any ordinary principle, with the notion that he was only dealing with that which the brother should not have spent or given away in his lifetime. The words are: 'I give and bequeath unto the said Robert Hasketh, the elder, and Michael Damtry, my executors,' etc.

. . . . Then, when we look at the rest of the will,—and I think on this demurrer we are at liberty to look at the whole of the will,—we find that it is full of gifts to take effect after the survivor of the testator and his brother. . . . I am of opinion that all these things show, and lead to the necessary implication, that the testator was not, in the subsequent part of his will, merely dealing with the part of his estate which should be left undisposed of by his brother,—that he meant to make provision for that which might occur in the case of his brother's death in his lifetime. I think the natural and proper meaning of it would be, taking the whole context of the will, to say, notwithstanding there is a gift, in the first instance, of the real and personal estate, in terms purporting to be an absolute gift, out and out, of the whole, that the gift is cut down to an estate for life, with that which is practically exactly the same thing,—an absolute power of appointment and disposal in any way in which the legatee might think fit. . . .

Whichever way you take it, it seems to me the real meaning of the gift over is, that it was to be in case the brother did not live to dispose of, or, if living, did not dispose of, the real estate. That being so, it appears to me the gift over is not made void by those words, by its being, as it is said to be, a violation of the rule that a man can not create a new course of devolution in a gift once given, for that is what I hold to be the meaning of the word 'repugnant.'" Bagally, L. J., said: "I am of the same opinion. It appears to me, that when you consider it, the primary gift in favor of the brother, John Stringer, is divided into three portions: the gift itself, the power conferred, and the

gift over in the event of the power not being exercised." And after arguing on the different clauses in the will, considered together, he says: "On the whole, I think that the only way to give effect to all the provisions in the will is, to hold that the testator gave to his brother a life estate, with a power of appointment and disposition over the real and personal estate, and with regard to that real and personal as to which there was no exercise of the power of disposition, the various provisions of the after-part of the will were to take effect."

Third—We think the evidence sufficiently sustains the views of the Appellate Court, that the notes, collection of which is enjoined by its judgment, were given for money derived from the sale of real estate. While it is true, as contended by counsel, that there is not entire concurrence as to dates and amounts, nor such a division between Reuben M. and Ethan A. as should have been if the loaning of the money had been intended as the final settlement of the balance in her hands, yet it is to be borne in mind this loaning was not intended as a final settlement, but evidently only as advancements, from time to time, subject to recall if necessity should require it. Exact proof, excluding all doubt, in such cases, is often impossible, and certainly in no case is indispensable. It was here shown that the land was sold for cash; that Elotia subsequently loaned this money to the remainder-man; that, speaking of Reuben, she said the money was his, etc. The sale for money, and the subsequent loan of money, made a *prima facie* case that the money loaned was that derived from the sale. The burden then changed to the defendants to show, if this was not the same money, what money it was. We do not think they have overcome that *prima facie* case.

The judgment is affirmed.

Judgment affirmed.

See, also, *Patterson v. Wilson*, 5 Am. Prob. Rep. 25; *Nash v. Simpson*, Id. 357; *South v. South*, 4 Id. 69; *Faulk v. Dashiell*, Id. 81, and the note; *Hospital Trust Co. v. Commercial Bank*, Id. 563, and the note;

Price v. Courtney, Id. 575, and the note; Collins v. MacTavish, Id. 586; Bates v. Bates, 3 Id. 212; Henderson v. Blackburn, Id. 456; Baird v. Boucher, Id. 467, and the note; Lent v. Howard, Id. 109; Robert v. Corning, Id. 178; Stokes v. Payne, 2 Id. 28; Jennings v. Teague, Id. 8; Alexander v. Wallace, Id. 291; Stuart v. Walker, Id. 79; Collier v. Grimsey, Id. 487, and the note.

DOUGHTEN vs. VANDEVER.

[5 Delaware Chancery, 51.]

CONSTRUCTION.—CHARITABLE TRUSTS.—DOCTRINE OF CY PRES.

It is a general rule in the construction of wills that the intention of the testator is to govern, but it is the intention expressed by the will. The doctrine of *cy pres* has never been recognized in this State. Trusts for educational and religious purposes, and for the benefit of the poor, the sick, the afflicted, and the helpless, are charitable. The Court of Chancery in this State has been accustomed to exercise only the judicial function of the English Court of Chancery; but the ordinary powers of a court of equity, applied properly to the subject-matter, are sufficient to carry into effect all charitable bequests reasonable in their character and proper in their objects.

BILL IN EQUITY for the construction of a will. It appeared in evidence that Amy Doughten, then of White Clay Creek Hundred, in New Castle County, in and by her last will and testament, dated the 2d day of November, 1846, among other things, bequeathed as follows:

"Item 7. I do give and bequeath to the trustees of the Deaf and Dumb Asylum of Philadelphia, in the State of Pennsylvania, and their successors forever, the one-sixth part of my estate, to be applied to the benefit of said institution or corporation.

"Item 8. I do give and bequeath to the trustees of the Widows' Asylum of Philadelphia, in the State of Pennsylvania, and their successors forever, the one-sixth part of

my estate, to be applied to the benefit of said institution or corporation.

"Item 9. I do give and bequeath to the trustees of the Orphans' Asylum of Philadelphia, of the State of Pennsylvania, and their successors forever, the one-sixth part of my estate, to be applied to the benefit of said institution or corporation.

"Item 10. Having full confidence in the wisdom, integrity, and benevolence of the excellent gentlemen whom I shall hereafter appoint my executors, I do give and bequeath to them, my said executors, the rest and residue of my estate, to be distributed and disposed of among such charitable institutions and to and for such charitable purposes out of the State of Delaware as they, in their wisdom and benevolence, shall designate and select; and I do hereby give them full and perfect authority and power to select such objects of charity as to them seemeth fit and proper, subject only to the foregoing, viz.: That in selecting such objects of charity they must go out of the State of Delaware, and distribute and dispose of said residue accordingly, without let or hindrance from any person or persons whomsoever."

The testatrix appointed the Rev. Nicholas Patterson and Matthew Kean executors.

By the first item of her will she excludes her brother Isaac Doughten, and his heirs and descendants, from any portion of her estate.

By the second item she excludes her brother William Doughten, and his heirs and descendants.

By the third item she in like manner excludes the heirs and descendants of her deceased sister, Elizabeth Wolston.

By the fourth item she in like manner excludes her brother John Doughten, and his heirs and descendants.

By the fifth item she excludes her brother Benedict Doughten, and his heirs and descendants.

On the 4th day of July, 1866, the testatrix made a codi-

cil to her said last will and testament, in which she declares as follows :

"First. I hereby revoke and declare null and void the tenth item in my said last will and testament, and in lieu of the said devise therein contained I give and devise to my nephew Mordecai Doughten, with whom I now reside, the full sum of \$1,000, and to his heirs and assigns forever, for the purpose of compensating him for his trouble in taking care of me whilst with him. I also give and devise to the wife of the said Mordecai, and his two daughters, Anna E. and Mary Jane, the sum of \$100, to be equally divided amongst them, share and share alike ; and to the said wife and daughters I also give and devise my bureau, bed, bedding, and bedstead.

"Second. All the residue of the three-sixths of my estate, real, personal, and mixed, as contained or mentioned in the said tenth item of my said last will and testament, I give and bequeath to the trustees of the Marine Society of Philadelphia, in the State of Pennsylvania, and to the trustees and managers of the Philadelphia Waterworks, in the last-named State, to be equally divided amongst them, share and share alike, and to their successors in office forever, to be applied to the benefit of the said institutions or corporations."

By her codicil she appointed Peter B. Vandever, Benjamin S. Booth, and Thomas T. Enos, in lieu of her first-named executors, who had died.

The testatrix died on or about the 3d day of July, 1868. The will and codicil were admitted to probate, and letters testamentary were granted to the executors named in the codicil. Benjamin S. Booth never received, disbursed, or in any manner interfered with the estate of the testatrix or any part thereof. The estate was settled by Vandever and Enos, who passed separate final accounts thereon before the register on the 6th day of January, 1872. It appears by the account of Enos that he was on that day indebted to the said estate in the sum of \$3,296.14. It appears from Vandever's account that he was on that day indebted to

said estate in the sum of \$16,834.23; the said two sums aggregating the sum of \$20,130.37.

Since the date of said settlement the Pennsylvania Institution for the Deaf and Dumb, a corporation of the State of Pennsylvania, located in the city of Philadelphia, claiming to be entitled to the legacy bequeathed in said will to the trustees of the Deaf and Dumb Asylum of Philadelphia, in the State of Pennsylvania, recovered judgment in the Superior Court of the State of Delaware in and for New Castle County.

Since the recovery of said judgment, Vandever has paid to the said corporation—that is, to the Pennsylvania Institution for the Deaf and Dumb—the sum of \$2,805.71, with its interest, less United States taxes, being one-sixth of the balance remaining in his hands as aforesaid; and the said Thomas T. Enos has paid to the said corporation the sum of \$540.36, with its interest, less United States taxes, being the one-sixth of the balance remaining in his hands as executor aforesaid.

There is now due the estate of the testatrix from said Enos the sum of \$2,746.78, with interest from the 6th day of January, 1872, and from the said Vandever the sum of \$14,028.52, with interest from the same date.

The bill is filed by the heirs-at-law of Amy Doughten, claiming that there are no such persons, institutions, or corporations in the State of Pennsylvania as the trustees of the Widows' Asylum of Philadelphia, in the State of Pennsylvania; the trustees of the Orphans' Asylum of Philadelphia, in the State of Pennsylvania; the trustees of the Marine Society of Philadelphia, in the State of Pennsylvania; the trustees or managers of the Philadelphia Waterworks in the last-named city,—the legatees named in the said last will and testament and codicil.

The bill alleges that the said legacies are void for misdescription or uncertainty, and prays that the defendants, Peter B. Vandever and Thomas T. Enos, respectively, may be decreed to pay to the complainants respectively their respective shares of the said undistributed balance so held

by them as executors, with interest from the 6th day of January, 1872, which shares are stated in said bill.

To meet the objection that the bequests are void for uncertainty or misdescription, the claimants maintain that they are charitable in character, and therefore not subject to the same rules which apply to trusts of a private nature.

C. B. Lore, for the complainants.

George M. Conarroe and *William G. Whiteley*, for certain beneficiaries.

John O'Byrne, for the city of Philadelphia.

THE CHANCELLOR. I shall attempt no enumeration of the various gifts which have been declared charitable. It is only necessary to remark that trusts for religious and educational purposes, and for the benefit of the poor, the sick, the afflicted, the helpless, are charitable. They are governed by the rules that apply to trusts for private benefit. The intention of the donor is ascertained by the application of the same rules of construction. Where, however, it is plain that a public charity is intended, different rules from those applied to private trusts may be invoked in order to give effect to the intention of the donor, and to establish the charity. A public charity will not fail by reason of the fact that the trustee is uncertain, or is incapable of taking, or that the objects of the charity are uncertain and indefinite. These, however, would be fatal to gifts for private benefit. The greatest favor has for many centuries been shown by those who make and administer the laws to gifts for public charities. This favor is clearly discernible in the history of Roman legislation and jurisprudence. Writers on the civil law furnish the clearest evidence of the peculiar regard in which testaments for charitable purposes were held.

We all know how favorably gifts for charitable uses

were regarded by the early English law. Prior to the enactment of the Statute of Distributions (22 Car. II, chap. 13), the ordinary was obliged to apply a portion of the residue of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man, or that every man must be presumed to have intended a portion of his goods for the benefit of charity. In 1601 the statute of 34 Elizabeth, chap. 4, commonly called the Statute of Charitable Uses, was enacted. It is unnecessary to consider the provisions of this statute, or the objects sought to be accomplished by its enactment. I can find no evidence that it has ever been recognized as in force in this State. It is true that we derive our system of equity jurisprudence from that of England; but they err who suppose that the jurisdiction of the English Court of Chancery over charities or charitable bequests owed its origin to the provisions of that statute. It is now fully established that the Chancellor of England had and exercised jurisdiction over charities and charitable uses long before that statute. That jurisdiction was of two distinct characters,—ministerial and judicial. The king, as *parens patriæ*, had the administration of all charities. The judicial part of this administration was entrusted to the ordinary equity jurisdiction of the Court of Chancery. The part not thus entrusted the king exercised, as part of his prerogative, by his sign manual. This latter part, however, was generally administered by the Chancellor, representing the king as *parens patriæ*. The ministerial function of the Chancellor was exercised in cases not cognizable by him acting solely in his judicial capacity. Of this class of cases may be mentioned gifts made for charitable uses that were illegal or contrary to public policy, or that were impossible to be carried into effect, or in cases of charity generally, or to religion or education, without directions when, where, or by whom the gift should be applied or used.

The principle or doctrine of the exercise of this ministerial function of the English Chancellor was what is known as *cy pres*; that is to say, where there was a definite chari-

table purpose which could not take place, the court would substitute another, and formerly of a very different character. It was not, however, in the exercise of the judicial function of his office, but in the exercise of his ministerial function, that the English Chancellor applied the fund to a different purpose from that contemplated by the testator, provided it was charitable. It has been well remarked that "most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the Crown and the Statute of Charitable Uses." (43 Eliz. chap. 4.) The doctrine of *cy pres* has never been recognized in this State. Our Court of Chancery has been accustomed to exercise only the ordinary or judicial function of the English Court of Chancery; and it is believed that the ordinary powers of a Court of Equity, applied properly to the subject-matter, are sufficient to carry into effect all charitable bequests reasonable in their character and proper in their objects. While, under our system of equity jurisprudence, charitable bequests to be administered only *cy pres* cannot be sustained, chancery here, as in England, in the exercise of its judicial functions,—here it possesses no other,—will sustain bequests in favor of charity not in contravention of law or public policy and that are capable of being carried into effect by the exercise of the judicial power vested in the court; and where a testator has clearly indicated when, where, how, and by whom his gifts are to be applied or used; and also in all cases of such charities in which nothing is wanting for their application but a trustee. In the latter case chancery will not allow an otherwise proper trust to fail for want of a trustee, but will supply that want.

What is a charity, a charitable use, a public charity? In the case in *Ambler*, to which reference will be hereafter made, this definition is given: "A gift to a general public use which extends to the poor as well as the rich."

In *Jackson v. Phillips* (14 Allen, 556), Justice Gray says: "A charity, in a legal sense, may be more fully defined as a

gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

These general principles, applicable to public charities, seem sufficiently established by equity decisions. It is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects, or whether the corporate designation has been mistaken. If the intention sufficiently appears on the bequest, it will be held valid. (*Witman v. Lex*, 17 Serg. & R. 88.)

The general rule is that where either a corporation, or a natural person is so identified by the name and description in the will, as applied to the facts and circumstances, as to distinguish such person or corporation from all others, such person or corporation shall take the bequest in the same manner as if no discrepancy had appeared. (*Minot v. Boston Asylum*, 7 Met. 418.)

Where the name and description in a legacy, when applied to the facts, lead to a reasonable belief that they apply to some one person, and there is no other person to whom they can with any probability apply, then much slighter evidence will be sufficient to prove that that person was intended in the designation. (*Ibid.*)

The general rule certainly is that the intent of the testator is to govern in the construction, but it is the intention expressed by the will and not otherwise. To get at the intention expressed by the will, every clause and word are to

be taken into consideration, because one clause is often modified and explained by another. Every implication, as well as every direct provision, is to be regarded. And further, as a will must necessarily apply to persons and things external, any evidence may be given of facts and circumstances which have any tendency to give effect and operation to the words of the will; such as the names, descriptions, and designations of persons, the relations in which they stood to the testator, the facts of his life, etc. If in the matter of description there is a mistake,—that is, if there is no one who corresponds to the description in all particulars, but there is one who corresponds in many particulars, and no other who can be intended,—such person will take. (*Ibid.*)

If the will applies definitely to two or more persons, so that either would be entitled to take under the will but for the existence and claim of the other, then parol evidence is admissible to prove which was intended. When that proof is supplied, the will operates, by its own force and terms, to give the property to that one, as if such person had been the only one named or described. The evidence does not create the gift, but simply directs it. When the name or description used in the will does not designate with precision any person; but, when the circumstances come to be proved, so many of them concur as to indicate that a particular person was intended, and no similar conclusive circumstances appear to distinguish and identify any other person,—the person thus shown to be intended will take.

W., by will, among other legacies, bequeathed as follows: "To the Marine Bible Society I give \$1,000." There was no such society at the date of the will or at the time of its probate. There had existed some time previously a society by the name of the Boston Young Men's Marine Bible Society, which had been dissolved or become extinct before the death of the testator, the meetings of which he had, during his life-time, occasionally attended, and to the funds of which he had contributed. The court says: "This

misdescription is a slight one. There is no other society claiming to be the society intended under this description, and there are various facts introduced and tending to identify this society as the one designated by the testator to receive his legacy. If a testator errs in the name of the legatee, but sufficiently identifies the person or corporation, such error does not defeat the legacy." (Swinb. Wills, pt. 7, § 5.)

Where legacies are mentioned in a will by names which they never in point of fact had, yet they will take upon its being proved that the testator intended them. (*Winslow v. Cummings*, 3 Cush. 362, 363.)

A leading case—or one that is entitled to be considered such on account of the eminence of the judge announcing the opinion—upon the subject of charitable bequests, and of a recent date, is that of *Domestic & F. Miss. Society's Appeal* (30 Pa. 425), as is also that of *Cresson's Appeal* (Id. 437). The former case decides that a legacy to the missions and schools of the Episcopal church about to be established at or near Port Cresson upon the western coast of Africa, is a good charitable bequest to the Domestic & Foreign Missionary Society of the Protestant Episcopal Church of the United States of America, by whom the mission at Port Cresson was established, and upon whom it is dependant for support; and that in case of a charitable bequest it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application; that the law regards the substance of the gift, and, in favor of charity, vests it in the party capable of taking it, in whose case it was given; and that parol evidence is receivable to show the situation in which the testator stood towards the objects of his charity, and to designate who were intended by the will to be the recipients of his bounty.

In the latter case parol evidence was received to show that a bequest to the "Refuge for Decayed Merchants" was

intended for a charitable society incorporated under the name of the Merchants' Fund.

I shall attempt no enumeration of the objects which have been adjudged charitable. They are almost innumerable. It is not necessary to do so in this case. If the legatees under this will are designated with sufficient accuracy, and if the objects of the testatrix's bounty are sufficiently ascertained, or are capable of being ascertained, so that the bequests may be beneficially applied, there can be no question as to the charitable nature of the bequests, except as to the bequest to the "trustees or managers of the Philadelphia Waterworks." This bequest must fail. The Philadelphia Waterworks are not a public charity. The bequest is not good at common law, because there is no such corporation as the Trustees or Managers of the Philadelphia Waterworks, and there are no fiduciary managers of said works. The only managers of the works are its legal owner, the city of Philadelphia, and it is not to be presumed that the corporation styled the City of Philadelphia was intended to be the object of the testatrix's bounty. Trustees are never intended as the beneficial objects of bounty. They are intended as the fiduciaries for others than themselves. They control and manage interests or estates, not for their personal benefit, but for the benefit of others. In this bequest the words "trustees" and "managers" were intended to have substantially the same signification, and were intended to describe persons acting in fiduciary relations. The city of Philadelphia sustains no such relation either to the waterworks or to the persons using the water supplied by them. The city is the absolute owner of the works; it manages the works as its other property, and taxes the property-holders of the city for the use of the water supplied to them. The case of *Jones v. Williams* (Amb. 651), does not support the city's claim in this case. In that case, John Williams, by his will, taking notice that the town of Chepstow was much in want of good spring water, and that there was a subscription some time since set on foot for bringing the same to the town, but by some

misunderstanding was dropped, gives £1,000, to arise by a sale of his real estate, for the purpose of bringing spring water from St. Arvins, or elsewhere, to the town of Chepstow, for the use of the inhabitants forever, which is to be laid out by his trustees and executors in bringing the said water to the said town and making conduits and reservoirs; and gives £200, if wanting, and directs a sum to be left in the Bank of England, or an estate bought with it, which will bring in £10 a year, to keep the waterworks in good order. Clearly this was a gift for a charity. It was, says the court, a gift for a general public use, which extended to the poor as well as the rich. No money was exacted for the use of the water. No tax was imposed in order to furnish the supply. The testator's estate was to receive no return in consideration of his bounty. The testator furnished the water freely for the use of all the inhabitants of Chepstow. The city of Philadelphia does not furnish, by means of her waterworks, water to the inhabitants of that city, to the poor as well as to the rich, freely and without charge, and is not, therefore, in this respect, the object of a charitable bequest. A corporation owned by the State, and supported by a public tax or from government funds, is not the object of a charitable bequest, nor would a corporation belonging to a city, nor a corporation owned by private individuals for supplying any article, however necessary, for which supply a compensation was demanded, be the object of a charitable bequest. The Philadelphia Waterworks are simply property belonging to the city, and are no more a public charity than a horse or a street car, or a fire engine owned, controlled, and managed by the city. I therefore decide that the bequest in the testatrix's will to the trustees and managers of the Philadelphia Waterworks is invalid.

In view of the principles hereinbefore stated, and the decisions hereinbefore referred to, do the Orphan Society of Philadelphia, the Indigent Widows' and Single Women's Society, and the Pennsylvania Seamen's Friend Society, answer with sufficient certainty in designation or description

the objects intended by the testatrix, in her will and codicil thereto, as the "trustees of the Orphans' Asylum of Philadelphia, in the State of Pennsylvania;" the "trustees of the Widows' Asylum of Philadelphia, in the State of Pennsylvania," and the "trustees of the Marine Society of Philadelphia, in the State of Pennsylvania?"

I will first consider the claim of the Orphan Society of Philadelphia to the bequest made in the will to the "trustees of the Orphans' Asylum of Philadelphia, in the State of Pennsylvania." The designation of the asylum mentioned in the will, and that of the society claiming the fund, is not in all respects the same. The latter takes under a devise or bequest, not the trustees, but directly in its corporate name, which is the Orphan Society of Philadelphia. If otherwise entitled to the benefit of the fund, the bequest to the trustees instead of to the corporation direct in its corporate name would not, in my opinion, be fatal to the claim. It would in either case be the corporation intended to be benefited, and not the representatives of the corporation. Two things are certain from the consideration of this will, viz.: the testatrix meant that none of her heirs-at-law should derive any benefit from her estate, and that her estate should be applied to what she considered public charities; and she has attempted to designate corporate agencies through which her charities should be administered. If she really meant the corporations claiming, and there be sufficient proof in the case, either from inspection of the will or otherwise, her intention must prevail notwithstanding a mistake in their designation. I do not regard the difference in designation in itself as sufficient to exclude the claimant from the benefit of the fund if it answers the description of the bequest. The material inquiry is, is the description of the two—that is to say, is the purpose, object, and character of the two—the same, or so identical as to exclude the idea of uncertainty? The testatrix intended to make an incorporated institution, the object and purpose of which was to benefit or support orphans, her agent in the distribution of her bounty for the benefit or support of

orphans. An asylum may be a society, and a society may be an asylum. It is the thing, the corporate being, and not the name of the thing or corporate being, which is material. It is in proof that the claimant was commonly called the Orphans' Asylum, and it is conceived that there cannot be, in reason, any material distinction between an orphan asylum and an orphan society, when either is regarded or spoken of or meant to be described as an institution for the protection or relief of the unfortunate; and this is one of the definitions of an "asylum," given by Webster, with examples, as an asylum for the poor, for the deaf and dumb, and, he might have added, for orphans.

An incorporated society is an institution. It may be for many purposes. It may be for business, for religious or charitable objects. The purposes for which it is established or instituted will determine its character. It is a society for orphans, or an orphan society, the general usage, as well as the proper understanding of the term, would determine its character as that of a society for the protection or relief of orphans. An orphan asylum has no other character; nothing else is descriptive of it. There is no orphan asylum in Philadelphia whose corporate name answers the designation in the testatrix's will nearer than—or as near, in my opinion, as—that of the Orphan Society of Philadelphia. I doubt if there are any answering the description so near. The few other orphan asylums referred to in the cause appear to be denominational or class in character. It would have been more satisfactory, if it could have been done, had proof been made that the testatrix had personal knowledge of some particular institution for the benefit of orphans. The omission of this proof, however, ought not to be considered as evidence that she had no knowledge or information of any institution of that character in the city of Philadelphia, and of the orphan society in particular. That which was generally known among the friends of the institution may have been known to her personally, and the institution therefore may have been designated by her by its popular rather than by its

corporate name. In her extreme want of charity towards her relatives, in not providing for "those of her own house,"—which high authority has declared to be worse than infidelity,—she seems, nevertheless, to have wished to devote her estate to objects which she considered charitable. There is no other claimant to this bequest, although, by order of the court, publication of notice to all corporations desiring to claim the same has been made in a paper called the *Legal Intelligencer*, published in the city of Philadelphia. Considering the length to which courts have gone in order to establish charitable bequests, and that, if the claim of the Orphan Society of Philadelphia is disallowed, the bequest of the testatrix for the benefit of orphans must fail,—whatever may be my private opinion of the propriety and wisdom of the action of the testatrix in disposing of her property as she has done by her will, as a judge, recognizing the decisions of courts in analogous cases, I am constrained to give effect to this bequest, and to decide in favor of the claim thereto made by the Orphan Society of Philadelphia.

The same reasoning will apply to the claim of the Pennsylvania Seamen's Friend Society. Its designation is not that employed by the testatrix in her will. There is little in common between them; the one is the trustees of the Marine Society of Philadelphia, and the other is the Pennsylvania Seamen's Friend Society. There is no society or asylum in Philadelphia answering the designation in the will. It is, however, evident from the will itself that the testatrix meant, by her bequest to the trustees of the Marine Society of Philadelphia, a bequest for the benefit, protection, or support of mariners. Does the Pennsylvania Seamen's Friend Society sufficiently answer the description of a marine society, and such a marine society as the testatrix meant; and did she mean it? If it does not so answer, and if she did not mean it, her bequest to the "trustees of the Marine Society of Philadelphia" must fail; for there is no other claimant to it, and there is no other society proved to exist that can take the bequest. Webster defines the

word "marine," as an adjective, pertaining to the sea, transacted at sea. "Marine," as a noun, he defines to be a soldier that serves on board of a ship and fights in naval engagements. He defines marines to be a body of troops trained to do military service on board of ships. Also the whole navy of a kingdom or State. Again, the whole economy of naval affairs, comprehending the building, rigging, equipping, navigating, and management of ships of war in engagements. He defines "a mariner" to be a seaman or sailor,—one whose occupation is to assist in navigating ships. He defines "a seaman" to be a sailor, a mariner,—a man whose occupation is to assist in the management of ships at sea. He says naval skill is the art of managing a fleet, particularly in an engagement; "a very different thing from seamanship. Nothing is more common than to speak of our naval marine and our commercial marine." The term "marine" is not exclusively appropriate to either. It is common to both. It will be observed that the object of the testatrix was to bestow a charity, the recipients of which should be mariners. All the other institutions or societies mentioned or referred to in this cause, having any relation to or connection with the terms "marine" or "seaman," were either governmental or beneficial, and cannot therefore be considered as objects for charitable bequests or public charities. Section 2 of the charter of the Pennsylvania Seamen's Friend Society is as follows:

"§ 2. The object of this corporation is to promote the social and moral improvement of seamen at home or abroad."

It is therefore a charitable corporation or institution. Now, although the designation of the Pennsylvania Seamen's Friend Society is not the same as that used by the testatrix in the codicil to her will, to wit, the trustees of the Marine Society of Philadelphia, in the State of Pennsylvania,—yet, as there is no other claimant of the bequest, nor any other institution in Philadelphia of a charitable character answering to the description of a marine asylum, which must mean an asylum or society for the benefit, pro-

tection, or support of mariners or seamen, whether naval or commercial; and as it appears from the charter and the reports of the Pennsylvania Seamen's Friend Society that it does meet the description of a marine asylum,—that is, that it is an institution for the benefit of mariners or seamen; and inasmuch as a court of equity will not allow a charity to fail if it can reasonably be applied,—I am of opinion, notwithstanding the absence of proof of any general or special knowledge on the part of the testatrix of the existence of the Pennsylvania Seamen's Friend Society, that said society is entitled to the bequest, in the codicil, to the “trustees of the Marine Society of Philadelphia, in the State of Pennsylvania.”

The evidence discloses the existence of no institution or corporation in the city of Philadelphia answering the designation of the Widows' Asylum of Philadelphia, in the State of Pennsylvania. The name of St. Ann Widows' Asylum appears in one of the directories of the city of Philadelphia, made one of the exhibits in this cause. Nothing is known of it, however, from the evidence, other than its name, which would seem to indicate that it is denominational in character. It is not a claimant of the bequest. In a list of some of the benevolent institutions of the city of Philadelphia, made an exhibit in the cause, there appears to be in that city an institution the corporate name of which is Penn Asylum for Indigent Widows and Single Women of the city of Philadelphia, which was incorporated in the year 1852, six years after the will was made which contains the bequest. Of course the testatrix could not intend this corporation, and it has not appeared and claimed the bequest. The Indigent Widows and Single Women's Society, incorporated in 1819, is the only charitable institution or corporation that has appeared and claimed the bequest to the trustees of the Widows' Asylum of Philadelphia, in the state of Pennsylvania. James Bayard, a witness examined in the cause, speaking of the claimant, says: “I am well acquainted with the Indigent Widows and Single Women's Asylum of Philadelphia,—have

known it about fifty years." He also says: "In common parlance this institution was called the Widows' Asylum. Unless it was for some specific business purposes, I never heard it called by the corporate name in common parlance." He also states that single women were admitted into the institution, and that single women had as much right as widows; that it was not exclusively a widows' society; that he could not say what proportion of single women and widows had been admitted at any time since its institution; and that its charity extended as well to single women as widows. He also states that members of his family and intimate friends were managers of the institution, and that the name given it by his family and friends in common conversation was the Widows' Asylum. The rule for the application of charities is that, where a charity is given to any object by special designation or description, and that designation or description equally applies to two or more objects, the charity will fail from the want of certainty as to the particular object intended; but that which would be otherwise uncertain in such a case may be rendered reasonably or absolutely certain by parol evidence indicating the particular charity intended. Of this description of evidence would be the proof of the testator's relation to the particular institution, if an institution be the object of the charity; the name by which one of the institutions, if there were more than one claiming, was commonly called; and any other circumstance tending to show the particular charity intended. In the forty-seventh annual report of the managers of the Indigent Widows and Single Women's Society, for the year 1863, which I find among the exhibits in the cause, is the following: "The storm which has broken over our unhappy country has as yet been unfelt within the walls of the society's asylum." Again: "Most of the applicants are deserving gentlewomen, who have fallen into poverty in the decline of life, and whose education has taught them to shrink from dependence on individual charity." In their twenty-eighth annual report, for the year 1844, is the following: "This society is founded for the

relief of aged and indigent women. It recognizes no sectarian preferences. The only requisites for participation in its charities are advanced age, destitution, and meritorious character." Again: "It is especially designed to provide an asylum for those whose earlier lives have been passed in the more refined walks of life, and whom experience therefore has not inured to the struggle of penury." As the testatrix, in her bequest to the trustees of the Orphans' Asylum of Philadelphia, must have meant to bestow a charity upon orphans, and in her bequest to the Marine Asylum of Philadelphia, must have meant to bestow a charity for the benefit of seamen, so in her bequest to the Widows' Asylum of Philadelphia she must have intended a charity in favor of widows. The society claiming the bequest does not answer the designation of the asylum mentioned in the will; but the charity answers the description of the charity intended by the will, unless the participation of single women in the charity administered by the claimant renders the description dissimilar. I cannot suppose that a charity including that mentioned in the will, but more extensive in its benefits, and extended to an equally meritorious class of persons of destitute condition, especially as the charity is or may be given to the corporation by its popular, and not its corporate designation, can have that effect. For these and the additional reasons assigned in reference to the other charitable bequests hereinbefore considered, I shall decree the Indigent Widows and Single Women's Society of Philadelphia entitled to the bequest to the "trustees of the Widows' Asylum of the city of Philadelphia, in the State of Pennsylvania." I have not overlooked the fact that each one of these bequests to intended charitable institutions has been directed, in the will and codicil, to be applied to the institutions or corporations respectively. This form of bequest, however, I regard as no more or less than a direction that the benefits of the bequests shall be enjoyed by the classes of persons respectively for whose benefit those institutions or corporations exist.

I am aware that I have in this opinion gone quite far

enough in the application of well-recognized equitable principles to charitable uses. It would not have been a matter of regret to me if I had been able to arrive at different conclusions. There is nothing in the will of Amy Doughten, with respect to these charitable bequests, at the expense of her relatives in blood, that meets the approval of my judgment. Her example in this respect I would not commend as worthy of imitation; and nothing but a sense of duty, which compels me to follow the law as expounded by courts of equity, has caused me to give an interpretation to the provisions of her will and the codicil thereto by which her heirs-at-law are excluded from the benefit of sharing her estate.

See, also, *Beardsley v. Selectmen of Bridgeport*, 5 Am. Prob. Rep. 298, and the note; *Webster v. Morris*, Id. 158; *Bristol v. Bristol*, Id. 382, and the note; *Goodale v. Mooney*, 4 Id. 1, and the cross-references; *Fairfield v. Lawson*, Id. 86; *Prichard v. Thompson*, Id. 92; *Coit v. Comstock*, Id. 164; *Barnum v. Mayor of Baltimore*, Id. 291, and the note; *Quinn v. Shields*, Id. 386; *Sowers v. Cyrenius*, Id. 541; *Hesketh v. Murphy*, 3 Id. 7; *Matter of Schouler*, Id. 249; *Simpson v. Welcome*, 2 Id. 248; *Nichols v. Allen*, Id. 369; *Piper v. Moulton*, Id. 574, and the note; *Power v. Cassidy*, 1 Id. 368; *Kinney v. Kinney*, *supra*, 158; *In re Campden Charities*, 18 Chan. Div. 810; s. c. *Brett's Leading Cases in Equity*, 28, and the note; *Attree v. Hawe*, 9 Chan. Div. 387; s. c. *Brett's Leading Cases in Equity*, 29, and the note.

PARKER vs. LINDEN.

[118 New York, 28.]

EQUITABLE CONVERSION FOR THE PURPOSES OF THE WILL ONLY.

A direction in a will for equitable conversion may be absolute and imperative, or it may be for the purposes of the will only.

APPEAL from a judgment of the general term of the Supreme Court in the first judicial department. The disputed clause in the will in question was as follows :—

“Sixth. I order, after all my just debts and bequeaths are fully paid and discharged, that my real estate be sold at public auction, under the direction of a referee appointed by the order of the Supreme Court ; that said referee execute to the purchaser or purchasers a deed of the premises sold ; the proceeds of the sale, after deducting his fees and expenses of sale, said referee shall deposit in the Supreme Court to be invested under the direction of said court, in the same manner as money belonging to nonresidents according to the rules and practice of the Supreme Court in such cases, for the use and benefit of William, Mark and Jane Lego as before directed, subject to the further order of the court.

“The property situate on the southeasterly corner of Eighth avenue and Thirty-fifth street, I direct not to be sold during the time the dower right of Mary Ann Graham is a lien on said property.”

The other facts appear in the opinion.

Henry Brewster, for the executors, appellants.

L. A. Gould and *A. J. Skinner*, for other appellants.

Edward S. Peck, for the respondent.

DANFORTH, J. The important question is whether the direction for conversion is, by the terms of the will, absolute and imperative, so as to be complete to all intents and purposes, or whether the conversion directed is for the purposes of the will only. If the latter, then if those purposes fail, or do not exhaust the proceeds, the property unapplied, whether the estate has been actually sold or not, will devolve according to its original character. (*Gourley v. Campbell*, 66 N. Y. 169.) Here the controversy is between Marie Linden, the widow respondent, and the residuary

legatees, and, according to the construction given, the first gains and the other class loses. Was there a conversion so far as the widow was concerned? The residuary legatees are the next of kin and heirs-at-law of the testator, and he directed the proceeds of the sale of his real estate to be given to them, and as nonresident aliens the doctrine of conversion would, if necessary, apply in their favor. (Lewin on Trusts [7th ed.], 812.) He may be deemed to have known it and framed his will for their benefit. This was the view of the General Term. That court regarded it as clear that "the testator intended that his estate should be converted into personalty in order that his alien brother and sister might take." It was, in fact, unnecessary to accomplish that object; as to all others except the State they could take and hold as heirs or devisees. (Chap. 38, Laws of 1875.) There is, however, nothing to indicate that his purpose was to give the widow more than the law entitled her to demand.

It is plain he wished her to get no part of his estate, and, indeed, cut her off with \$1, and directed his executors to devote, if necessary, the rest of his property to resisting any attempt she might make to get more. Of course if his language requires an out and out conversion, this exclusion of the widow is of no moment, but it is of some aid in getting at his intent. We are of opinion that, as to the widow, there was no conversion of the realty, and that her rights are not increased by the provisions of the will in that respect. She is entitled to her dower in the real estate of which the testator died seized, and if he died intestate as to any portion of his personal estate, she is entitled to a distributive share of that portion. (*Lefevre v. Lefevre*, 59 N. Y. 434.) She neither gains nor loses through the provisions of the will. Her rights are independent of them. The testator devised his real estate to his half brother and half sister. The will contains no words from which an intimation can be gathered that he intended to impress a new character on that estate, or that either the power of sale or its exercise should change the direction of this bounty, or

alter the essential nature of the property so characterized. No wish of the testator is expressed which requires a sale except for some purpose of the will itself. If not required for that purpose a conversion will not be presumed. (*Chamberlain v. Taylor*, 105 N. Y. 185.) If Linden had left no will, the widow's rights in the real estate would have been limited by her dower interest; and there is nothing in that instrument or the circumstances of the case which can increase her share. If a sale is necessary, the residue of the proceeds of the land will belong to the heirs. If unnecessary for any purpose directed by the will, they are entitled to it in its present form, and a sale against their objection should not be decreed. They have a right to that, and "the notional conversion" will subsist only until the *cestui que trust*, who is competent to elect, intimates his intention to take the property in its original character. (*Seeley v. Jago*, 1 P. Wms. 389.)

The appeal must prevail and the judgment of the General and Special Terms be reversed and new trial granted, with costs to all parties to be paid out of the fund.

We are furnished with a record showing a separate appeal by Martha Lythgoe from the same judgment, but differing in no other respect from the case just considered, and to which, as one of several appellants, she was a party.

Her appeal should be dismissed as unnecessary, without costs to either party.

All concur, except EARL, J., not voting.

Ordered accordingly.

See, also, *Lent v. Howard*, 8 Am. Prob. Rep. 109; *Jones v. Caldwell*, 2 Id. 154, and the note; *Evans v. Hardy*, Id. 391; *Peterson's Appeal*, 1 Id. 187; *Power v. Cassidy*, Id. 368; *Matter of Corrington*, *supra*, 120; *Beach on Wills*, §§ 83, 340, 341, 342, 343, 344.

RIKER vs. CORNWELL.

[118 New York, 115.]

GENERAL RESIDUARY CLAUSES.

A general residuary clause, not circumscribed by clear expressions in other parts of a will, includes any property or interests of the testator which are not otherwise perfectly disposed of, and all that for any reason eventually fall into the general residue.

APPEAL from a judgment of the general term of the Supreme Court in the first judicial department. The opinion states the facts.

Clifford A. H. Bartlett, for the appellants.

John E. Parsons, for the executors, respondents.

Stephen P. Nash, C. E. Tracy, Edward W. Sheldon, M. M. Budlong, Sewell, Pierce & Sheldon, and H. B. Clossen, for other respondents.

GRAY, J. The appellants ask us to reverse the judgments below, for errors in the construction by the court of the will of Sarah Burr, deceased. Their principal contention is that certain dispositions of her property, made by way of legacies for charitable and religious purposes, were invalid or ineffectual, and that such gifts neither were carried by the provisions of the will, which were made for the residuary legatees, nor vested in the persons named as executors, under certain other clauses. If they are right in their views, the result would be that, as to so much of her estate, testatrix had died intestate and the next of kin would benefit correspondingly. The testatrix died in 1882, unmarried; leaving her surviving neither child, parent, brother nor sister. Her will was made in 1866, and two codicils were subsequently executed in the years 1869 and 1881, respectively. Beyond a few legacies to relatives and friends,

she disposed of her large possessions by gifts to charitable societies, or for definite benevolent purposes in this and other States and countries. By the seventh clause of the will in case of a misnomer of any of the institutions, or their incapacity to take and hold the legacies, she gives the sum constituting any ineffectual gift to her executors "to be applied to the charitable uses or purposes as above indicated, in such manner as they shall be able; giving the same, however, to them absolutely, relying on their carrying out substantially my purposes." By the next following, or eighth clause, she gives "all the rest, residue and remainder" of her estate, "*including all void and lapsed legacies, if any, not carried by the terms of the preceding clause,*" in equal parts, to six charitable societies named. The first codicil makes further bequests to various individuals and societies and repeats the provision contained in the seventh clause of the will, designed for the case of a legacy being ineffectually given or becoming void. The second codicil recites the fact of there being a large increase in the residuary estate of the testatrix since the making of the will and previous codicil, and "in order to carry out more widely the charitable and religious purposes intended," she makes further large bequests to a number of charitable societies. Of this last codicil the second and third clauses are important to our consideration of the questions arising, and I give them in full.

"Second. And I do hereby will and direct that the following named institutions, to wit: The Sheltering Arms, etc., (naming fourteen additional societies), shall share my residuary estate remaining after the payment of all the legacies and carrying out all the trusts and provisions made by me in my said will and first and second codicils (excepting the residuary bequests given in the eighth clause of my said will) in equal shares with the institutions named in the said eighth clause of my said will; and I give and bequeath the same accordingly, it being my intention that the corporations, institutions and societies, hereinabove named in this second clause, together with the six corporations,

institutions and societies named in the said eighth clause of my said will, shall receive in equal shares *the residue of my personal estate and of the proceeds of my real estate.*

"Third. If any of the legacies or bequests given by me in this codicil should, from any cause whatever, fail to take effect, I give and bequeath the amounts of such legacies or bequests so failing to take effect unto my executors, who shall qualify as joint tenants, absolutely, in full confidence that they or the survivor or survivors of them will dispose of such amounts as I would have desired myself to do.

"Fourth. I hereby republish my said will and first codicil as altered hereby."

The second clause of this last codicil, read in connection with the eighth clause of the will, constitutes as the sole residuary legatees of testatrix twenty societies; while, in each testamentary instrument, she endeavors to prevent a failure of disposition in a gift of a legacy, by substituting her executors as its recipients, in the place of the legatee for which the ineffectual gift was originally intended. A very plain intention is manifest, from a consideration of these testamentary provisions, that, beyond the particular gifts to the individuals and societies named, all that remained of her estate the testatrix devoted to charitable and benevolent purposes, through the instrumentality of certain selected institutions as her residuary legatees, or of her executors, where a bequest proves ineffectual. The purpose is evident to leave no part of her estate undisposed of, in any contingency. Her solicitude is unmistakable that, beyond what has been given to them, her relatives shall not share in her estate by reason of any portion of it being invalidly disposed of. With her motives, or with her reasons, we are in no wise concerned. If, in her testamentary dispositions, she has kept within the rules which should govern in the making of wills, those dispositions cannot be successfully assailed by the next of kin. The main or controlling question, therefore, which presents itself at once in this case is, whether, under the testamentary scheme revealed by these

several instruments, in any contingency, the appellants, as the next of kin of the testatrix, can take any benefit by reason of a legacy failing to take effect. If they cannot, it becomes quite unimportant to discuss the many questions which they raise with respect to the capacity of legatees to take, or to the validity of certain bequests.

At the outset, we may as well dispose of the only objection which is made as to any of the societies named as the residuary legatees. It is objected that "The New York Society for the Relief of the Ruptured and Crippled" lacks corporate capacity to take, in that its certificate of incorporation was not acknowledged, and that it was not properly indorsed by the justice of the Supreme Court. Neither ground of objection is tenable.

The proof of the certificate by a subscribing witness was a sufficient compliance with the provisions of the statute; and the indorsement of the certificate, as "approved" by the justice, was a sufficient warrant for filing by its clerk. But even if defects existed in the proceedings for incorporation, the passage of subsequent acts by the legislature was a recognition of its incorporation and cured such defects.

Coming, then, to the consideration of the effect of the residuary clause upon the estate of the testatrix, we are unable to perceive any ambiguity in the language which the testatrix uses; or to detect any purpose to narrow that all comprehensive import which attaches to a general residuary clause in wills. A general residuary clause includes in its gift any property or interest in the will which, for any reason, eventually falls into the general residue. It will include legacies which were originally void, either because the disposition was illegal, or because, for any other reason, it was impossible that it should take effect; and it includes such legacies as may lapse by events subsequent to the making of the will. It operates to transfer to the residuary legatee such portion of his property as the testator has not perfectly disposed of. No one supposes that he has failed in his intention to dispose of all his property by his will, and courts should endeavor to make out such an intention

and to uphold the testamentary plan, so that the testator may not, as to some of his estate, have died intestate. We think, in the present case, that the testatrix has expressed herself with absolute clearness in making a general residuary disposition of her property, and that it carries with it everything which she died possessed of and which was not otherwise effectually disposed of. There is the language of the eighth clause of the original will, by which *void and lapsed legacies* are included in the gift of the residuary estate, and that of the second clause of the second codicil, by which the residuary legatees are to share the residuary estate remaining after the payment of all the legacies and carrying out all the trusts and provisions made in the will and first and second codicils . . . in equal shares." Such language would seem to be comprehensive enough, and should preclude our entertaining the idea that the testatrix meant to circumscribe or to limit the residuary fund given to the societies and to confine it to so much of her estate as would be ascertained after deducting what she had previously mentioned in bequests.

A different purpose is emphasized by the concluding words of the second clause of the last codicil, which state that it is her "intention that the corporations, institutions and societies hereinabove named in this second clause, together with the six corporations, institutions and societies named in said eighth clause of her said will, shall receive in equal shares *the residue of her "personal estate and of the residue of her real estate."* The appellants argue that the words "after payment of all the legacies and carrying out all the trusts and provisions made," etc., found in the second clause of the second codicil, are words of exclusion and are indicative of an intention to give only a specific residue. We see no force in the suggestion. In ascertaining the intention of the will-maker, we should not seek it in particular words and phrases, nor confine it by technical objections. We should find that intention by construing the provisions of the will with the aid of the context and by considering what to be the entire scheme of the will. The in-

tention, to which effect is to be given, should be one harmonizing with that scheme, where no rule of law is contravened thereby. When the testatrix explicitly declares it as her intention that her residuary legatees shall receive "the residue of her personal estate and of the proceeds of her real estate," I find no room for speculation as to intention, nor support for the proposition that the residuary legatees take a gift of a specific residue. I find a gift to them, which comprehends all of her estate not otherwise legally disposed of. In the English chancery case of *Springett v. Jennings* (Eng. Law R. 6 Ch. App. 333), cited by the appellants' counsel upon his brief, James, L. J., points out a distinction between an all-comprehending gift of a residue and one which carries a particular residue.

By way of illustration he suggests: "I give all my £3 per cent. to A., and all the rest of my government stocks to B., and the gift of the £3 per cents. to A. fails by lapse, will they go to B.? It appears to me the answer must be in the negative, for it is quite clear that the rest of the government stock was not a residuary bequest which could take in the particular thing which was given by a separate description to somebody else. . . . The failure of the first gift would not be for the benefit of the person to whom the other stocks are given." And Mellish, L. J., says, in the same case: "Now, in order that a residuary gift may . . . include lapsed and void devises, without the will expressing any intention to that effect, I am of opinion that the devise must be a real residuary devise; that is to say, so worded as to apply to all land that is not otherwise disposed of. When a testator has made a gift of that kind, then the act says, in substance, it will be presumed from the universality of the gift that unless he expresses the contrary, he intends it to pass what was specifically devised, if from any cause the specific devise fails." The words upon which the appellants lay so much stress, as being words of exclusion and limitation, are used by the testatrix rather as words of description of a general residue. They might have been omitted without any prejudice to the

intention. But their retention works no confusion of thought. That which is "remaining after carrying out all the trust and provisions made by me in my will and codicils" is the fund, which is only completely ascertained, when the previous dispositions have been effectuated. The very sense of the words implies the negation of the idea of a specific or fixed residue, outside of the sum of the previous gifts in the will. If the "carrying out" of the provisions of the will and codicils is defeated to any extent, to that extent the residuary fund is increased by the accretion of the void or lapsed gift. I think the doctrine is firmly established, by the reported cases and by the text books, that where the residuary bequest is not circumscribed by clear expressions in the instrument, and the title of the residuary legatee is not narrowed by special words of unmistakable import, he will take whatever may fall into the residue, whether by lapse, invalid dispositions or other accident. (Roper on Leg. [1st Am. ed.] 453; 2 Wms. on Exrs. [7th ed.] 1567; 2 Redf. on Wills [2d ed.], 115; *Bland v. Lamb*, 2 Jac. & W. 406; *Reynolds v. Kortright*, 18 Beav. 427; *James v. James*, 4 Paige, 115; *Van Kleeck v. R. D. Church*, 6 Id. 600; *King v. Strong*, 9 Id. 94.) In a late decision of this court in the *Matter of Benson's Accounting* (96 N. Y. 499), Earl, J., discusses the question of when lapsed legacies fall into the residue, and reviews the authorities; and the views expressed in his opinion sustain the doctrine which I have suggested here. In *Kerr v. Dougherty* (79 N. Y. 327), which the appellants have cited, there is no opposition to that doctrine, nor is it an authority which at all militates against our conclusions here. In that case the language of the will and the facts were such as to limit and circumscribe the residuary clause and to prevent it from being added to by invalid legacies. But Miller, J., in his opinion, uses this language, in discussing the rule as to residuary bequests, which is laid down in *King v. Woodhull* (3 Edw. Ch. 79, 82): "It is also said, in substance, that to exclude what would fall by lapse or invalid disposition, as it may be supposed that the testator did not intend to die intestate as to any

portion of his property, the law requires that he should use words limiting the gift of the residue and showing an intention to exclude such portions of his estate as may fail to pass." In *Floyd v. Carow* (88 N. Y. 560, 568), Andrew, J., says of a residuary devise: "The intention to include is presumed, and an intention to exclude must appear from other parts of the will."

In view of the result at which we have arrived, namely, that, under this residuary clause, the legatees would share in a residuary fund, capable of being increased by the falling in of what was ill given previously by the testatrix, we think it wholly unnecessary to consider the effect or validity of the gifts to the executors. In any event, the question would be one between them and the charitable societies, named as residuary legatees, and one with which these appellants are not concerned.

The judgment appealed from should be affirmed, with costs to the respondents who have appeared here, to be paid out of the estate.

All concur.

Judgment affirmed.

See, also, *Floyd v. Carow*, 2 Am. Prob. Rep. 499.

JONES vs. WEBB.

[5 Delaware Chancery, 182.]

CONSTRUCTION.—THE WORDS "IN CASE OF THE DEATH
OF EITHER OF THEM."

Where a testator devises to A. and B. all his real and personal estate whatsoever, share and share alike, but in case of death of either of them it is to go to their children, the devisees surviving the testator take an absolute interest in both

the personal and real estate devised to them. The words "in case of death of either of them" mean death in the lifetime of the testator, and not death at any time however distant.

PETITION FOR PARTITION. Israel D. Jones in his last will and testament, probated December 24, 1834, devised as follows: "I do give and bequeath to my sister Elizabeth Jones and sister Sarah J. Webb all my real and personal estate whatsoever, share and share equal alike; but in case of death of either of them it is to go to their children."

The testator at the date of his will and at the time of his death was seized of an estate in fee simple of the lands mentioned in the petition. He left to survive him a widow, Margaret Jones, and two sisters and a brother, his only heirs at law, viz., the said Elizabeth Jones and Sarah J. Webb and Jesse G. Jones.

Elizabeth Jones was never married; she died in 1845. By her will, dated the 16th day of 12th month, 1845, she devised as follows: "As to all the residue and remainder of my estate, real and personal, wheresoever and whatsoever, I give and devise the same to my sister Sarah Webb, wife of Reuben Webb, of the city of Philadelphia, currier, to her sole and separate use, for and during the time of her natural life, and from and after her death I give and devise the said residue and remainder of my estate, real and personal, to all the children of my said sister, Sarah Webb, who may be living at the time of her death, their heirs and assigns, and to the issue of any such child or children of said Sarah who may be living at the time of her decease, their heirs and assigns; such issue to take only the share or shares which would have belonged to his or her parent or parents if such parent or parents had been living at the time of my said sister's death; such issue to take their shares justly and equally among themselves."

The petitioner is a son of Jesse G. Jones, and a grandson and one of the heirs at law of Israel D. Jones. Sarah J. Webb is living, and has three daughters who are living, namely, Elizabeth W. Hobson, Harriet W. Paist, wife of Mahlon K. Paist, and Margaret A. Kitchen, wife of James

Kitchen. Sarah J. Webb was the mother of James Webb, who is dead, leaving to survive him a widow, Susan R. Webb, and three children, Harriet P. Webb, Benjamin C. Webb, and Charles J. Webb, who are living.

Benjamin Nields, for the petitioner.

John C. Patterson, for the defendants.

THE CHANCELLOR. The material question to be considered in determining the right of the petitioner to partition of the land described in the petition is, What estate did Elizabeth Jones take in said lands under the will of her brother, Israel D. Jones? Did she take a fee simple, or a life estate only therein? To determine this question, it is necessary to consider the effect of the words "but in case of death of either of them it is to go to their children."

Mr. Jarman says, in his treatise on Wills, vol. 2, 659: "It has become an established rule that where the bequest is simply to A. and in case of his death, or if he die, to B., A. surviving the testator, takes absolutely." The case of *Loufield v. Stoneham* (2 Str. 1261), has always been supposed to favor this view. In that case the words of the will were: "I give to my living brother John Stoneham £1,000, and in case of his death, to his wife, Susana" (who was the defendant). It appeared that John Stoneham survived the testator, and therefore the plaintiff insisted this legacy (which the defendant admitted to have received) vested absolutely in him, and was assets in her hands. The action was against the executrix, in which the plea of *plene administravit* was pleaded. On the part of the defendant it was offered to give in evidence that the testator *in extremis* declared he meant only to give his brother the interest of the £1,000, and that the defendant should have the principal in case she survived him. The chief justice rejected the evidence, remarking that in the case of *Brown v. Selwin* (Cas. t. Talb. 240), the House of Lords had refused it even where it was to support the legal interpretation of the will.

This remark of the chief justice has been considered by text-writers, and by subsequent decisions, as determining the legal effect of the words "in case of his death," although the particular question before the court seemed to be whether parole evidence was admissible to determine the meaning of the testator in the use of those words. The inference as to the legal meaning of the words in the opinion of the judge is plain.

In *Trotter v. Williams* (Prec. in Ch. 78), the devise was to A. £500, to B. £500, and so to five others a like sum; "and if any to whom I have given any money legacy happen to die, then his or her legacy, and all the residue of my personal estate, to go to such of them as be then living." The court says the words "shall go to such of them as shall be then living" must refer to a certain time, and that is, when the legacies become payable, which is at the death of the testator.

In *Hinckley v. Simmons* (4 Ves. 160), the words of the will were: "I do give and bequeath unto my sister Mary Hinckley all my fortune and everything I have a power to leave, and, in case of her death, I do then give and bequeath all I have to my mother, Mary Hinckley." Lord Chancellor Loughborough says: "Upon the construction of the will, I am perfectly satisfied upon the case of *Lowfield v. Stoneham* (2 Str. 1261), which is precisely this: taking the words to import a contingency, and not limiting the estate of the defendant May Simmons to an estate for life, I am of the opinion she is entitled absolutely."

In the case of *Lord Douglas v. Chalmer* (2 Ves. Jr. 501), the testatrix gave all the rest and residue of her personal estate and effects, subject, etc., for and to the use and behoof of her daughter Frances, Lady Douglas, and, in case of her decease, to the use and behoof of her children, share and share alike, to whom my said trustees and executors shall account for and pay over and assign the said residue. By a codicil she gave her finest diamond ring to her daughter Douglas. The Lord Chancellor said: "It is not an indifferant circumstance that, in the codicil, there is a legacy

of a ring to Lady Douglas. I cannot possibly construe that to be consistent with her having all the interest in the residue, except upon the supposition that, at the time of making the codicil, the testatrix had quite forgot what she had done by the will; but if the residue was given to her for life only, it is very intelligible and natural that the best diamond ring should be given to her; it is that species of legacy that indicates personal affection and regard, and distinguished her as not having anything absolutely in the residue." It is manifest, therefore, that other circumstances than the words "and in case of her decease" controlled the decision.

In the case of *King v. Taylor* (5 Ves. 806), the testatrix gave legacies to her two children respectively. The will contained this item: "I do will and ordain that, if either of my children should die, the surviving shall have what I have left to the other." The son survived his sister, and claimed her share under the will. The Master of the Rolls said: "I am much inclined to think it is impossible to raise any judicial doubt upon this case; for repugnancies would arise from the construction of the defendant. This is perfectly distinguishable from all the cases upon which the words 'in case of,' 'if it shall happen,' etc., for here is a specific time pointed out at which it appears evidently to be the intention that the legatee should be put in complete possession of the legacy; which must be expunged and declared not to operate to any intent whatsoever, and to have been put in for no purpose upon the defendant's construction." The defendant was the surviving brother and claimant. This case was, from a consideration of the terms of the will itself, distinguished, as the Chancellor says, from all the cases, upon the words "in case of," "if it shall happen," etc.

In *Cambridge v. Rous* (8 Ves. 12), legacies were given to two sisters, with a direction, in case of the death of each reciprocally, to devolve to the other. It was decided that that direction was confined to a case of a lapse by the death of either in the life of the testator, and did not pre-

vent the vesting absolutely. The Master of the Rolls, Sir William Grant, in his opinion, remarks: "The case therefore resembles more *Hinckley v. Simmons* and *Lowfield v. Stoneham*, than either of the other three; in those two no particular circumstances to influence the construction appeared,—nothing to argue from in the context of the will; and they seem to support the proposition that when such words occur by themselves, and there is nothing to explain them, they import the contingency of dying before the testator."

In the case of *Webster v. Hale* (8 Ves. 410), it was held that a legacy of stock in trust for the use, exclusive right, and property of A. but, should she happen to die, then in that case among her children; another legacy of stock to A. to be paid her as soon as possible, or, in the event of her death, among her children; another legacy of stock to B. and, in case of her death, among her children,—were all legacies absolute in the respective mothers. The Master of the Rolls said: "The difficulty in all such cases is to ascertain what the testator meant by applying words of contingency to an event that is certain. The words taken literally imply doubt as to an event of which no doubt could be entertained. A construction therefore is absolutely necessary; either that whenever the first legatee dies, the other shall take, or that if the first is prevented from taking by dying in the lifetime of the testator, the other shall be substituted for him; in other words, whether it means an interest for life to one with remainder to the others, or only that, in case the one does not take, the other shall. The first consideration is which construction the words naturally bear. It does seem that the two first bequests point more to an alternative disposition either to Mrs. Webster, or to her children, than to a bequest in succession, first to her and afterwards to her children. In the first bequest he uses words which seem to convey an intention of giving her the absolute property in the stock. The word 'but' is disjunctive and adversative. It opposes one case to another, and implies that the children are to take

in an event different from that in which the parent is to take." The meaning and effect of the word "but," as recognized in this case, is that claimed for the same word in the will of Israel D. Jones by the solicitor for the defendants.

A testator devised as follows: "All the rest and residue and remainder of all my real and personal estate, whatsoever and wheresoever, I give, devise, and bequeath unto my aforesaid trustees for the use and benefit of Mrs. Ann Popplewell, and, in case of her death, to be equally divided between the children of my half-brother, William Whitehall." Mrs. Popplewell survived the testator; Sir William Grant, Master of the Rolls, decreed payment to the executor of Mrs. Popplewell, as having taken the absolute interest. (*Ommaney v. Bevan*, 18 Ves. 291.)

In the case of *Beatty v. Montgomery* (6 C. E. Green, 327), the Chancellor says: "If a legacy is given simply to A., without fixing any time for payment, with provision that, if A. should die, it shall go to B., this gives a vested legacy to A. if he survives the testator; the death is held to be death in the life of the testator."

In the case of *Home v. Pillans* (2 Mylne & K. 15), the will contained, among others, the following bequest: "I give and bequeath to my nieces Catharine and Mary, the sisters of the said David and John Home, the sum of £2,000 sterling each, when and if they should attain their ages of twenty-one years, and which said legacies to my two said nieces I give to them for their and each of their own sole and separate use, free from the debts or control of their or either of their husbands; and in the case of the death of my said nieces, or either of them, leaving children or a child, I give and bequeath the share or shares of such of my said nieces or nieces so dying, unto their or her respective children or child." The residuary clause of the will gave the residue of the testator's personal estate to trustees, upon trust for his nephew William C. McPherson, to be transferred and paid to him when and if he should attain the age of twenty-one; and it then proceeded in these words:

"And in case of his death under that age, then to my said nephews David and John Home, and to my said nieces Catherine and Mary Home, in equal shares and proportions; the shares of my said nieces to be enjoyed by them respectively, for their respective lives, for their own sole and separate use, free from the debts or control of their respective husbands; and on their death the share of each of them to go to their respective children; the children of each to take the share of their respective parents equally." The Master of the Rolls held that the interest taken by each of the testator's nieces in the £2,000 legacy did not become absolute in their respectively attaining the age of twenty-one, but continued to be subject to an executory bequest over in the event of their leaving children living at their death. Upon appeal Lord Chancellor Brougham reversed the decision of the Master of the Rolls. He says: "There can be no question that a bequest to any person, and in case of his death, to another, is an absolute gift to the first legatee if he survives the testator, and this, whatever be the form of expression; as, 'if he die,' 'should he happen to die,' 'in case death should happen to him,' etc.,—the event here contemplated being so inevitable that it cannot be deemed a contingency. The courts have held that something else must be intended than merely to provide for the case of the legatee dying at some time or other, and have said that they will rather suppose the testator to have contemplated and provided for the case of the legatee dying in his own lifetime, and so have read those words as if they had been 'in case of his death during the testator's lifetime;' in which event alone they have allowed the bequest over to take effect. The inconsistency of treating as a contingency the event of all others the most certain is not the only consideration which has swayed the courts in seeking for qualifications to restrict the generality of such clauses. The leaning in favor of vesting, and against a construction which would postpone the absolute enjoyment, and indeed keep in doubt and suspense the nature, of the interest bestowed, has here, as in other branch-

es of the law, operated powerfully in the same direction. To cite the instances in which the fundamental position to which I have referred has been laid down, or recognized and acted upon, would be to go through almost all the cases upon such bequests from the case of *Lowfield v. Stoneham* (2 Str. 1261), downwards. But there is a series of decisions by Sir W. Grant—in which he constantly adhered to the doctrine, commented upon the other cases, and reconciled some that were apparently (and but apparently) at variance with it—which may be consulted with great advantage, as bringing the whole matter within a convenient compass. I allude to *Turner v. Moor* (6 Ves. 557); *Cambridge v. Rous* (8 Ves. 12); *Webster v. Hale* (Id. 410); *Ommaney v. Bevan* (18 Ves. 291), and more particularly to the second of these,—*Cambridge v. Rous*. That was a bequest to two sisters, and each gift was coupled with a proviso that, in case of the death of one, the legacy should devolve to the survivor. Both were held clearly to vest absolutely on the legatees respectively surviving the testator. But I cite this case as much for the powerful view which Sir William Grant takes in his luminous judgment of the other cases, as for the decision which he there pronounces,—that ‘no difference whatever is made by the circumstance of the legatees over being the children of the first taker’ is equally beyond dispute. Indeed this was the case in *Turner v. Moor*, and in several other recent cases, particularly in *Slade v. Milner* (4 Madd. 144), decided by the present Master of the Rolls.” Again, the Lord Chancellor says: “It may thus be stated as a general proposition that, where the bequest over is in case of the legatees’ death, and no other reference can be made, the period taken is the life of the testator.” Again, he says, “that the construction adopted below, of death at any time, is inconsistent with all the cases from the earliest downwards, I feel fully assured.” A principle of construction, and which is applicable to the devise contained in the will of Israel D. Jones to his two sisters, is this: that a bequest made in terms which according to ordinary construction are sufficiently large to pass an abso-

lute interest is never to be cut down into a gift for life only, except in cases where this qualification is necessary to render the whole will consistent. (See the notes to 6 Ves. 557; 8 Ves. 410; 4 Ves. 162, 587.) It is also well established that no exception to the construction afforded by any of the preceding cases exists where the first gift is to the parent and the second to the children. The word "children," in such connection, will have no other or greater effect than the name of any other person. (2 Jarm. Wills, 663.) To resume the consideration of the rule of construction in respect to the words "in case of death." A testatrix bequeathed the sum of £4,000 to her friend and pastor, and in case of his decease, gave the same legacy to his wife, and at her decease to their eldest daughter. The Vice-Chancellor held that the plaintiff (her pastor), having survived the testatrix, was absolutely entitled to the legacy. (*Crigan v. Baines*, 7 Sim. 40).

In *Karker's Appeal* (60 Pa. 150), the court says: "Where personal estate is given to a person indefinitely or absolutely, and, in case of his death, to another, the disposition, though apparently constituting a gift of a life interest with a *quasi* remainder, is, in the absence of all indications of a contrary interest, construed to amount to an hypothetical limitation of the absolute interest, to take effect in the event of the person named as first taker surviving the testator, with an alternative limitation over to take effect in case of the death of the first taker in the lifetime of the testator." An appeal was taken from this decision to the supreme court of the State, and the decision was affirmed. (60 Pa. 155.)

In the case of *Hughes v. Hughes* (12 B. Mon. 115), the devise being to one "when of age or marry, this property in the event of the death of any one or more of said children, the survivors to inherit,"—it was held the time of the death of the devisees, or their marriage, was the point of time at which the contingency was to determine and the right became absolute, and not the death of the testator. The court, however, says: "In the case of an immediate

devise, it is generally true that a devise over in the event of the death of the preceding devisee refers to that event occurring in the lifetime of the testator." The words of the devise in this case, however, clearly show that it was the intention of the testator that the bequest should not be immediate, but should take effect only when the legatees should arrive at age or should marry, and by this circumstance is distinguished from an immediate bequest or devise. There are many cases which show that where there is another point of time other than at the death of the testator, the word "dying" may be referred to the event of legatees dying in the interval between the testator's decease and the period of vesting in possession. These cases, however, do not contradict the general construction given to the words "in case of death," but are confirmatory of it. The cases, although not the same, are analogous.

In the case of *Biddle's Estate* (28 Pa. 59), the bequest was as follows: "I give to my daughter Annie E. Biddle everything of which I die possessed. In the event of my daughter's death without children, I give and devise to Dr. John B. Biddle, George W. Biddle, and Chapman Biddle." The bequest to Annie E. Biddle was held to be absolute, she having survived the testatrix. An appeal was taken to the supreme court of the State, and the decree below was affirmed; the court deciding that the will gave the daughter an absolute estate, and that there was nothing in the will to reduce it. The court says: "The first gift is absolute, and the subsequent clauses make no profession of reducing it and must therefore be taken as intended for its failure to take effect by Annie's death before her mother."

A consideration of the cases to which I have referred establishes, in my judgment, the correctness of the rule of interpretation laid down in *Hawkins on Wills*, 254, which is: "Where there is a bequest to one person, and, in case of his death, to another, the gift over is construed to take effect only in the event of the death of the prior legatee before the payment or period of distribution, unless an intention appear to the contrary,"—a rule the principle of which

is so luminously expounded by Lord Brougham in the case of *Home v. Pillans* (2 Mylne & K. 15), hereinbefore referred to.

I consider the meaning of the words "in case of death" so firmly established by judicial decisions, by precedents and authority, that I am not at liberty to give them any other construction than that which they have uniformly received. It has been well remarked that although the intention of a testator is the governing principle with the court when looking at his will, yet the court is bound by precedents and authority, and will not proceed on arbitrary conjecture in settling its construction. (*Kingsland v. Rapelye*, 3 Edw. Ch. 1.) Had the estate given and devised by Israel D. Jones to his two sisters consisted only of personal estate, I could have no doubt that the interest which they took under the will was absolute in case they survived the testator, and that, having survived him, an absolute interest in the personalty immediately passed to them upon his death, which absolute interest could not afterwards be divested or in any manner affected by the words "in case of the death of either of them," occurring in the will; in other words, that whatever might have been the actual intention of the testator,—which it is impossible for us to know with absolute certainty according to precedents and authority, which create judicial certainty,—the words "but in case of death of either of them it is to go to their children" must be construed as meaning death of either of them in the lifetime of the testator. Does this rule apply to devisees of real estate? Hawkins, in his treatise on Wills, page 255, says it does.

In *Whitney v. Whitney* (45 N. H. 312), the court decides that a devise to four persons, their heirs and assigns, with a devise over should either one or more of them die, was a devise to take effect in possession immediately upon the testator's death; and that the words of survivorship were to be regarded as providing for the case of the death of any of the devisees in the testator's lifetime. (See, also, *Gee v. Mayor*, 10 L. & Eq. 455; *Ashford v. Haines*, 11 L. & Eq. 152;

Brimmer v. Sohler, 1 Cush. 118.) It was decided in *Briggs v. Shaw* (9 Allen, 516), that a devise of real estate to A., his heirs and assigns, and, in case of his decease, to the heirs of C. who might be living at the probate of the will, their heirs and assigns, share and share alike, was a devise to A. in fee if he survived the testator. To the same effect was the decision in the case of *Ash v. Coleman* (24 Barb. 645). In the case of *Hill v. Hill* (5 Gill & J. 87), where the devise was to two daughters during their single lives, and, after their death or marriage, to a grandson, O., to him, his heirs and assigns forever, and, in case of his death, to a grandson, V.; and where, upon the death of the testator, the two daughters entered, and one married and the other died, whereupon O. entered and continued in possession until his death,—it was held that the true construction of this will was that as O. was living at the time of the termination of the estate devised to the two daughters, he took an absolute estate in fee; and that the limitation over to V. failed to take effect.

Upon the authority of the foregoing cases, and in conformity with the general uniform tenor of decisions upon this subject, I am of opinion that, upon the death of Israel D. Jones, his sisters Sarah J. Webb and Elizabeth Jones, who survived him, under and by virtue of his will, took an absolute interest in both the personal and real estate devised to them; that the word "estate," in the will, carried the entire interest which the testator had in both species of property; and that the interest which passed to them under the will was not lessened or in any manner qualified by the words "but in case of the death of either of them it is to go to their children;" and that these words meant dying in the lifetime of testator, and not after his death.

The petition is therefore dismissed, with costs.

See, also, *Vanderzee v. Slingerland*, 5 Am. Prob. Rep. 61; *Matter of the New York, Lackawanna & Western Ry. Co.* Id. 502; *Rivenett v. Rivenett*, 4 Id. 264; *Cheever v. Circuit Judge*, 2 Id. 60; *Pinkham v. Blair*, 1 Id. 114; *Peterson's Appeal*, Id. 187; *Dove v. Torr*, Id. 483.

MILLER vs. COOCH.

[5 Delaware Chancery, 161.]

CHARGING THE REALTY WITH THE PAYMENT OF DEBTS
AND LEGACIES.

A testator, after declaring that his executor should pay all his just debts and funeral expenses as soon after his decease as possible, gave all his personal property, and \$3,500 in cash, out of his real estate, as soon as sold by his executor, to his wife; and in a subsequent item of his will gave \$500 to another; and in a subsequent item devised the balance of his estate to two brothers, to be divided between them share and share alike; and directed all his real estate to be sold at public sale, by his executor, within one year after his decease. *Held:*

(a) That the personal estate, being the primary fund for the payment of debts and funeral expenses, was not, by the terms of said will, or by a proper construction thereof, exonerated from such liability; nor was the said real estate charged therewith.

(b) That the gift of all his personal property by the testator to his wife was not specific in any other sense than as distinguished from the real estate or the balance of the testator's estate, being the proceeds of the sale of his real estate after the payment to which the same was properly subject was deducted.

(c) That, the whole frame and scheme of the will showing that the testator intended the legacy of \$500 should be paid absolutely and at all events, and he having previously given all his personal property and \$3,500 to his wife out of the sale of his real estate, the said balance of his estate is subject to the payment of the said legacy of \$500.

(d) The court will not, solely on the application of a legatee named in a will, direct the person having the execution of the will how to administer the estate, such person not asking for instructions and the bill filed not praying relief.

BILL IN EQUITY for the construction of a will. William Cooch, in his last will and testament, devised as follows:

"Item 1. It is my desire and wish that my executor, hereinafter named, shall pay all my just debts and funeral expenses as soon after my decease as possible.

"Item 2. I devise, give, and bequeath to my beloved wife, Tamar, all my personal property, and \$3,500 in cash out of my real estate, as soon as sold by my executor.

"Item 3. I devise, give, and bequeath to Dillon Hutchinson the sum of \$500.

"Item 4. I devise, give, and bequeath to my brothers

Zebulon H. Cooch and Levi G. Cooch the balance of my estate, to be divided between them share and share alike.

"It is my desire and wish that my executor hereinafter named shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or deeds for the same."

The testator then appoints his brother Levi G. Cooch executor of his will.

The bill is filed for the purpose of obtaining from the court a construction of the will of William Cooch as to the rights of the respective legatees and devisees named therein; or perhaps, to speak more properly, to have the rights of the executor of Tamar Cooch, and the rights of those whom he represents, determined by judicial construction. The material portions of the prayer are: "That this court will give the just and true construction of said will of William Cooch, deceased, and direct the defendant, the said administrator *cum testamento annexo*, therein; and particularly: (1) whether under the said will the said Tamar, his widow, was or was not entitled to all of the personal property of the said William Cooch at the time of his death, which passed under his will to his personal representative for administration, without diminution for funeral or testamentary expenses, or for debts or other legacies under the said will, there being ample other property belonging to the estate of said testator for the payment of all such expenses, debts, and legacies designated in said will and ordered to be converted into personalty; or (2) to what extent, under a just construction thereof, the said Tamar was entitled in her lifetime, and the complainant, as her personal representative since her decease, is entitled."

The executor of Tamar Cooch claims that she was entitled under this will to all the personal property of which William Cooch died possessed, or to which he was entitled at the time of his death, without any deduction therefrom on account of funeral and testamentary expenses, or on account of the payment of debts and legacies, and to \$3,500

out of the proceeds of the sale of the real estate ; that by the bequest of all of his personal property he meant that there should be no diminution therefrom for any purpose whatever ; and that, whatever charges his estate might be subjected to in the course of its administration, the proceeds of the sale of the real estate, and not his personal property, was the primary fund for their payment. The opposite view is maintained by the defendants.

John C. Patterson, for the complainant.

George Gray and Charles G. Rumford, for the defendants.

THE CHANCELLOR. It is a general rule—a settled rule—that the personal estate is the primary fund for the payment of funeral and testamentary expenses, debts, and legacies ; and this general rule must in every case be applied unless there appears from the whole or some part of the will that a testator intends that his real estate or its proceeds, either of rents or moneys raised upon the faith of it, or by sale, or in some other manner, shall be charged with their payment ; and unless it further appears, in like manner, that he does not intend that his personal estate shall be charged with their payment. It must satisfactorily appear that he not only intends to charge his real estate or its proceeds, but that he intends to discharge his personal estate from their payment. It was formerly held that this intention must appear from express words in the will. This doctrine is nowhere maintained at the present day. Had it been strictly adhered to, and not departed from, much litigation would have been saved, and judicial decisions upon this subject would have been much more uniform and consistent. Courts have used different forms of expression in determining the rule to be applied in the solution of the question of primary liability between the personal and real estate. Some judges have said that the intention to make the real estate the primary fund must appear by implication plain ; others, by intention clear ; others, by irresist-

ible conclusion ; others, that the mind of the judge must be convinced that he is deciding according to what the testator intended ; others, that the evidence of intention to charge the real estate and to discharge the personalty must be sufficient to satisfy the judicial mind. It was doubtless the intention of the testator in this case that every provision of his will should be carried into effect. He intended that his funeral expenses and debts should be paid ; that his wife should have his personal property and \$3,500 out of the proceeds of his real estate ; that Dillon Hutchinson should have \$500 ; and that his two brothers should have the balance of his estate ; and he intended that his real estate should be sold. He has not in express words said how, or out of what fund, the funeral expenses, debts, and legacy shall be paid. He has not expressly charged either the personal property or the proceeds of his real estate with their payment. He has not by express words exonerated either from their payment. The question to be decided is not whether they shall be paid, but what fund—the personal property, or the proceeds of the sale of the real estate—is primarily liable for their payment. The intention of the testator, if that intention can be collected from his whole will or from any part of it, must determine this question. There is nothing in this will to indicate the intention of the testator to charge the real estate, or the proceeds of its sale, with the payment of the funeral expenses and debts, unless proof of that intention is afforded by the use of the words “balance of my estate,” in item 4 of his will. There is nothing in the will to show an intention to discharge the personal estate from their payment, unless proof of that intention is afforded by the words “all my personal property,” in item 2 of the will. It will be observed that the testator has not in any manner or for any purpose blended his real with his personal estate, but has throughout his will clearly distinguished them. He has not directed his real estate to be sold, and made the personal property and the proceeds of the sale of the land a single fund for the payment of his debts, funeral expenses, and

legacies, and left the surplus proceeds of the sale of the real estate undisposed of, as in the case of *Sharpley v. Townsend* (4 Harrington, 337). In the latter case the court held that, under its particular circumstances, the sale of the real estate was a conversion out and out. In this case it nowhere appears that the testator ordered his real estate to be sold and to be blended with his personalty for any purpose; and he has not left the proceeds of its sale undisposed of; but, to use the words of the will, he has devised, given, and bequeathed to his two brothers the balance of his estate, to be divided between them share and share alike. The personal estate having been before given away in item 2 of his will, the word "balance," in item 4, can have reference only to the real estate or to the money arising from the sale of the real estate. The conversion under this will is therefore a conversion for the purposes of the will only, and not for all purposes whatever, which would be necessary for the purposes of a conversion out and out. Had the bequest in item 2 of the will been "my personal property," instead of "all my personal property," I presume it would not have been contended that the personal property was exempt from the payment of the debts and funeral expenses.

Do the words "all my personal property" have a fuller or more extensive meaning than the words "my personal property?" Do not the latter words mean the same as the former? Under certain circumstances, the word "all," before personal property, appears to have been considered as of considerable importance, and as showing an intention to bequeath such property as a whole, and not as a residuum. In Viner's Abridgment, vol. 8, there is a case in which the testator gave all his personal property to his wife, and £500 out of the proceeds of the sale of his real estate, and devised his real estate to trustees to be sold for the payment of his debts and legacies. Chancellor Harcourt decided in that case that the real estate devised for the payment of debts and legacies was the primary fund for their payment, and remarked that it was manifest the testator thought that all his personal estate was not sufficient for his wife, and

therefore he gave her £500 out of the proceeds of the sale of his real estate. It will be observed, however, that in that case the real estate was expressly devised to trustees to be sold for the payment of debts and legacies, of which the legacy to the wife was one. This,—which, however, would only ordinarily have made the proceeds of sale auxiliary to the personal estate for the payment of debts, and not the primary fund for their payment in exoneration of the personal estate,—would to my mind have been a more satisfactory reason for the decision than the one assigned.

Mr. Jarman, after reviewing the cases relating to this subject, remarks: "They authorize the proposition that whenever the personal estate is bequeathed in terms as a whole, and not as a residue, and the debts, funeral and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation."

I know of no case, however, where it has been held that the bequest of personal estate, in terms, as a whole, and not as a residue, has been sufficient to make the real estate the primary fund for the payment of debts and legacies, when those debts and legacies have not been thrown upon the real estate otherwise than by the mere bequest of the whole or all of the personalty. They are not so thrown in this case, unless the intention that such a result should follow appears from a proper construction of the words "the balance of my estate," in item 4 of the will. Do those words have the effect, when taken in connection with the word "all," in item 2 of the will, to throw the debts, legacies, and funeral charges upon the real estate primarily, and in exoneration of the personal estate? What is the meaning of those words, and to what have they relation?

In my opinion the words "balance of my estate" mean, primarily, his real estate, or the balance of the proceeds of the sale of his real estate, after deducting from said proceeds of sale any sum or sums with which those proceeds have antecedently been charged; that the only primary charge upon those proceeds,—pretermittig, for the present, the question as to the legacy to Dillon Hutchinson,—

is the sum of \$3,500 bequeathed to his wife ; and that, the personal estate being the primary fund for the payment of the funeral expenses and debts, the personal estate must first be exhausted before recourse can be had to this balance. If, after the payment of the debts, funeral and testamentary expenses out of the personal estate, there should be a deficiency, in whole or in part, for the payment of the legacy of \$500, or if, from a proper construction of the will, the personal estate should not be subject to its payment, and it should appear, when that question properly arises between parties who can raise the question, that the whole frame and scheme of the will plainly shows that the testator intended the legacy of \$500 to be paid absolutely and at all events (to use the language of the court in the case of *McLoughlin v. McLoughlin* (30 Barb. 469),—it will be time to determine the liability of the proceeds of the real estate for its payment.

That question, however, is not now before the court. It can only be raised in a proceeding to which the legatee and the devisees of the balance of the estate shall be parties. I decline, however, to enter any decree unless it be for dismissal of the bill, upon two grounds : (1) the bill is filed by the executor of a legatee for direction to the administrator *cum testamento annexo* of the testator how to administer the estate, and not by the administrator asking such direction ; and (2) the bill contains no sufficient prayer for relief.

The parties having agreed that the bill should be amended so as to present a case for final decision, it was not dismissed, and the cause was continued with leave to amend according to the agreement of the parties, to be subsequently filed. Afterwards, at the February Term, 1877, the bill having been amended as per agreement filed, and the cause being submitted without further argument,—

THE CHANCELLOR said : I adhere to the views heretofore expressed by me in respect to the primary liability of the testator's personal estate for the payment of debts, funeral and testamentary charges. I must, in the language of Sir R. Malins, V. C., in *Powell v. Riley* (12 Eq. Cas. 178), attrib-

ute to the testator the knowledge that his personal estate was the primary fund for the payment of his debts. With this knowledge he made his will, and nowhere therein declares, either expressly or by "implication plain," that he means to charge the real estate devised to his brothers with the payment of his debts, or that he means to exonerate his personal property therefrom.

In the case of *Powell v. Riley*, the Vice-Chancellor, while holding that in that particular case the bequest to the wife was specific, says: "If the will had stopped after the bequest of all his household goods and furniture, live and dead farming-stock, money, and securities for money, goods, chattels, and effects, and all his other personal estate, to his wife, for her absolute use and benefit, it would not, of course, have exonerated the personal property from the primary liability to pay debts." "It is true," he subsequently remarks, "I know no reason whatever, and I know of no authority that decides, that the words 'I give my household furniture' is other than a specific bequest;" and the solicitor for the complainant in this cause, if I understand him aright, was of opinion that the bequest by William Cooch of all his personal property was a specific bequest, and therefore discharged from primary liability to pay his debts. In a case subsequent to the case of *Powell v. Riley*,—the case of *Fairer v. Park* (L. R. 3 Ch. D. 309),—it was held that "a gift by will, by a testator to his wife, of 'all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements, and other things in the family mansion,' was not specific." In that case Hall, V. C., remarked: "The only question on which I wish to hear any argument is whether there was a specific gift to Agnes Park." After argument, the Vice-Chancellor said: "I am of opinion that, upon the true construction of this will, there is not a specific gift of 'all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock, and crops belonging to the Asby

Hall estate, to the defendant, Agnes Park.'” The dispositions are, first of all, a gift of “all my personal property,” and then the words which I have read are thrown in, not for the purpose of making anything specific, but for the purpose of preventing the possibility of a question arising as to the specified things being included under the terms “all my personal property.” In the will under consideration the bequest of “all my personal property to my beloved wife, Tamar,” is specific in no other sense than as being distinguished from the testator’s real estate, or the proceeds of such real estate; and “all his personal property,” being given to her, was so given subject to that primary liability for the payment of the testator’s debts, funeral expenses, and testamentary charges, from which he has not in his will, either by express words or implication plain, relieved it.

The will of the testator must, however, be reasonably interpreted. Having provided that his just debts and funeral expenses should be paid as soon after his decease as possible, and then having given all his personal property and \$3,500 out of the proceeds of the sale of his real estate to his wife, there remained nothing out of which to pay the legacy of \$500 subsequently given to Dillon Hutchinson, except the “balance of his estate,”—the proceeds of the sale of the real estate after the \$3,500 should be deducted. The \$3,500 has been paid by the person having the administration of the estate of William Cooch, with money advanced by the devisees of the real estate. Dillon Hutchinson has died since the commencement of this suit, but his administrator is entitled to receive, out of what the testator calls the “balance of his estate,” the legacy of \$500, with interest thereon, or such part thereof as has not been paid.

I therefore direct that a decree be drawn for the payment to the executor of Tamar Cooch, by the administrator of William Cooch, deceased, of the balance of the personal estate of said deceased, after paying the just debts, funeral expenses, and testamentary charges appearing on

the account filed in this cause, with interest from the time when the same should have been paid, together with the costs in this cause, within three months, or attachment.

See, also, *Williams v. Nichol*, 5 Am. Prob. Rep. 48; *Alsup v. Clarke*, Id. 497; *Porter v. Jackson*, 4 Id. 226; *Walter's Appeal*, 8 Id. 23, and the note; *Lofton v. Moore*, Id. 164; *Sistrunk v. Ware*, Id. 195; *Amherst College v. Smith*, Id. 323; *Thayer v. Finnegan*, Id. 360; *Hoyt v. Hoyt*, 2 Id. 318; *Le Fevre v. Toole*, Id. 403; *Read v. Cather's Administrator*, Id. 515; *Anderson v. Hammond*, 1 Id. 545; *Beach on Wills*, §§ 255, 256, 257, 258.

HUNT vs. FOWLER.

[121 Illinois, 269.]

BEQUESTS TO CHARITABLE USES.

Charitable bequests of a public nature are to be favorably and liberally construed, and in such a manner as to effectuate the intentions of the donor.

APPEAL from a decree of the Circuit Court of La Salle County. The opinion states the case.

George Hunt, the Attorney General, and *Mayo & Widmer*, for the appellants.

Duncan, O'Connor & Gilbert, for the appellees.

SHELDON, J. This was a bill in chancery, filed by the heirs-at-law of Esther S. Chapman, deceased, against the Attorney-General of the State, and the executors of the will of the decedent, to have a certain portion of the estate left

by her declared to be intestate, and to belong to the complainants, as heirs-at-law of the decedent.

The will, executed March 15, 1883, after making sundry bequests to various persons other than the complainants, concluded with this residuary clause: "All the residue of my estate I devise and bequeath unto the legatees hereinbefore named, in equal proportions, excepting said Oakwood Seminary and said Sylvester M. Chapman." Subsequently, on April 5, 1885, the testatrix executed a codicil, which contained this residuary clause: "All the rest and residue of my estate, including that which may lapse for any cause, I direct to be invested or loaned, upon the best terms possible, so as to produce the largest income, and said income to be distributed annually among the worthy poor of the city of La Salle, in such manner as a court of chancery may direct." Executors of the will were appointed. The decedent left both real and personal estate.

The bill alleges that the city of La Salle is situated in the town of La Salle, and includes but a small portion of the territory of the town, and that there is not now, nor has there ever been, in said city, any organization or association, voluntary or otherwise, for the distribution of charity to the poor of the city, and that the municipal authorities have no duties imposed upon them to provide for the poor, and claims that the residuary clause of the codicil is incapable of execution by reason of the uncertainty of the beneficiaries intended by the testator, and void, and that, in consequence, all the rest and residue of the estate, both real and personal, after the payment of the general and specific legacies, was intestate estate. A demurrer to the bill was interposed by the Attorney-General and the executors, which was overruled by the court, whereupon the executors answered, denying the invalidity of the residuary clause of the codicil, or that it was incapable of execution, and setting up, that even if such were the case, the rest and residue of the estate must be distributed in accordance with the residuary clause of the will. Thereupon, the bill was

amended by making the residuary legatees specified in the will additional parties defendant. Subsequently, a hearing was had, upon pleadings and proofs, and a decree was entered, finding that the residuary clause of the codicil was ineffectual to dispose of the property, but that it nevertheless revoked the residuary clause of the will, and declaring that the real estate of which the testatrix died seized, belonged to the complainants, as her heirs-at-law, and directing that the rest and residue of the personal estate should be distributed to the complainants as intestate estate. From this decree, the Attorney-General, the executors, and a portion of the legatees specified in the residuary clause of the will, have prosecuted this appeal.

There is, in American courts, much diversity of decision upon the subject of charitable trusts. In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified *cestui que trust*, clearly identified, or made capable of identification, by the terms of the instrument creating the trust. It is an essential feature of public or charitable trusts, that the beneficiaries are uncertain,—a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a *quasi* public character. (2 Pomeroy's Eq. Jur. sec. 1018.) In some of the States, the equitable system of distinctively charitable trusts is not recognized, and the courts apply only the rules applicable to express private trusts. In other States, the "Statute of Charitable Uses" of 43 Elizabeth, chap. 4, has been adopted or repealed, and thereby decisions have been influenced. And in other cases, local legislation or supposed local policy, to more or less extent, enters into adjudications. In another, and, as believed, the larger portion of the States, the system of charitable trusts as administered in the English Court of Chancery, in the exercise of its ordinary judicial power, prevails, with variation in regard to the element of certainty in the trustee and the object of the charity. A classification of the decisions in the several States will be

found in 2 Perry on Trusts, sec. 748, in note, and 2 Pome-roy's Eq. Jur. sec. 1029, and note.

The prerogative power of the Crown, exercised through the Lord Chancellor, as the representative of the king, as, where there is a gift to charity generally, without appointment of a trustee, and the bounty is devoted to some particular charity, or where there is a gift to a particular charitable purpose which can not be effectuated, and it is applied to some other charitable use, *cy pres* the original purpose, is regarded not as a judicial, but a ministerial, prerogative function. This prerogative power, courts in this country do not assume to exercise.

Were this subject of charitable trusts a new question with us, there would be opened up a wide and interesting field of discussion, in order for the establishment of the proper rule in this regard. But we are saved labor in this respect, from the ground having heretofore been gone over by this court, and the rule applicable to charitable trusts having been established to be that which is administered in the Court of Chancery in England, in the exercise of its ordinary jurisdiction as a court of equity. This was done in the case of *Heuser v. Harris* (42 Ill. 425), and where it was recognized that the statute of 43 Elizabeth, chap. 4, had been adopted in this State.

The entire contention in this case arises upon the construction, validity and effect of this residuary clause of the codicil. It is insisted, this clause is void for uncertainty as to the beneficiaries. This is not a bequest to charity generally, or to the poor generally, but to the worthy poor of the city of La Salle. The class here is definite—the worthy poor of the city of La Salle—but the individuals of the class to whom the bounty is to be distributed are uncertain. There is always this uncertainty as to individuals in the case of public charities, and it is this feature of uncertainty which distinguishes public charities from private charities,—charitable trusts from private trusts; and to hold charitable gifts to be void because of such uncertainty,

is to reject this whole distinctive doctrine of charitable trusts. (2 Redfield on Wills, 544, 66.)

In the case of a charitable bequest, it is immaterial how vague, indefinite and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one, over its application to those objects. (*Domestic and Foreign Missionary Society's Appeal*, 30 Pa. St. 425; *Perry on Trusts*, sec. 732.) It is denied that there is any such discretionary power here given, and *White v. Fisk* (22 Conn. 31), is cited in support of such denial. The bequest in that case was: "Any surplus income that may remain, to the extent of \$1,000 per annum, I direct to be expended by my said trustees, for the support of indigent, pious young men preparing for the ministry in New Haven." The decision was, that the gift was void, as the objects of the benefaction were indefinite, and that no power was conferred on the trustees to make them definite by selection. This case, though meeting with seeming approval in *Grimes' Ex'rs v. Harmon* (35 Ind. 198), has been disapproved by other high authorities. (See *Perry on Trusts*, secs. 713, 740, 748, note 1; 2 Redfield on Wills [2d ed.], 541, note; *Hisketh v. Murphy*, 36 N. J. Eq. 304.) The latter case especially speaks of *White v. Fisk*, as a case not likely to be followed.

In *Hisketh v. Murphy* the testator's will empowered and directed the trustees to employ the annual income of the fund "for the relief of the most deserving poor of the city of Patterson aforesaid, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral or undeserving, to receive any benefit from the said fund." It was objected that the gift could not be applied to its objects, and was void, because the will did not confer upon any one the power of ascertainment of the individuals who should receive the benefit of the bequest. But the court held that the power given the trustee, by the will, to distribute the fund, carried with it, by necessary implication, the power to select the beneficiaries from the designated class, and upheld the bequest. We entirely

agree with the criticism there made by Chief Justice Beasley, upon the case of *White v. Fisk*, that there was a mistaken assumption on the part of the court in that case that there was no power to select the objects of the charity lodged by the testator in the trustees,—that when a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications which can be ascertained only by the exercise of judgment and discretion, as the act of distribution can not be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it the incidental and necessary power of selection. And this, upon the ordinary doctrine that when an act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intendment of law, comprised in such grant of power. See *Pickering v. Shotwell* (10 Pa. St. 23), that the power in the trustee to act at discretion need not be expressly given, if it can be implied from the nature of the trust. In the later case of *Erschine v. Whitehead* (84 Ind. 357), the decision in *Grimes v. Harmon* does not seem to be approved in its full extent.

In *Heuser v. Harris* (*supra*), the bequest of money was “to the poor of Madison county,” the interest only to be used, with no appointment of a trustee. As the county court of Madison county was charged by law with the support of the paupers in the county, it was held in that particular case, that the poor of the county were its paupers, and that the fund should be held by the county court, to be applied for the latter’s support. It is not to be the inference from that case that a charitable bequest to the poor necessarily means to paupers, and that the trust is only to be executed by somebody charged by law with the support of paupers. “A bequest in trust for the poor inhabitants of a particular place, parish or town, is a charitable trust for the poor not receiving parochial or municipal aid and relief as paupers, on the ground that the charity is for the poor and not for the rich, and if it was applied to the main-

tenance of those supported by the parish, town or county, it would relieve wealthy tax-payers from their taxes, and not materially aid the poor." (Perry on Trusts, sec. 698.)

It is said in 2 Redfield on Wills (2d ed. 805), that some of the American cases have gone great lengths in carrying into effect the intention of the testator, when there was great indefiniteness in the objects of the trust; "that the want of a trustee, in such cases, is never any obstacle in the way of a court of equity carrying into effect any trust, and more especially one of a charitable character."

Mr. Pomeroy, in speaking of the distinguishing features between charitable and private trusts, says, that in the case of the former, "not only may the beneficiaries be uncertain, but that even when the gift is made to no certain trustee, so that the trust, if private, would wholly fail, a court of equity will carry the trust into effect, either by appointing a trustee, or by acting, itself, in place of a trustee." (2 Pomeroy's Eq. Jur. secs. 1025, 1026; and see *Brown v. Kelsey*, 2 Cush. 243, and *Washburn v. Sewall*, 9 Metc. 280.)

There can be no question of the general rule. But it is said it does not apply in a case where there is such indefiniteness as to beneficiaries as here. Numerous are the instances which might be cited where there was the want of a trustee, and the court executed the trust in cases of equal indefiniteness as here, as to the objects of the trust. As in *McCord v. Ochiltree* (8 Blackf. 15), where the legacy was for the education of pious indigent youths; in *Bull v. Bull* (8 Conn. 47), where the executors were to dispose of the residue of the estate "among our brothers and sisters and their children, as they shall judge shall be most in need of the same, this to be done according to their best discretion," and the executors died, never having exercised the power nor executed the trust; in *Williams v. Pearson* (38 Ala. 299), where the beneficiaries named were "all the paupers and poor children of two designated 'beats,' whose parents are not able to support them;" in *Howard v. American Peace Society* (49 Me. 288), where the gift was to the

suffering poor of the town of Auburn. Where a legacy is given to trustees to distribute in charity, and they all die in the lifetime of the testator, yet the legacy will be enforced in equity. (2 Story's Eq. Jur. sec. 1166.)'

An extended collection of cases on the general subject may be found in note to *Hisketh v. Murryhy* (35 N. J. Eq. 23), and in 1 Jarman on Wills, 403, in note. Mr. Perry sums up, as the result of the principles and authorities, that a "bequest for charity generally, . . . or to the poor generally, or to charity generally, with no trustees appointed, will not be carried into effect by the courts in this country." (Perry on Trusts, sec. 729.) That "if a testator makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee, according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint one, there is no power in the American courts to administer such an inchoate and imperfect gift." (Id. sec. 731.) That "it is immaterial how uncertain the beneficiaries and objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be." (Id. sec. 732; see, also, 2 Story's Eq. Jur. sec. 1169.)

In the present case, the testatrix appoints no trustee to distribute the fund, but expressly refers its distribution to a Court of Chancery. The power of distribution, in our opinion, carries with it the power to select the individuals to whom distribution shall be made. The trustee appointed by the court to make the distribution will have the incidental power to select the beneficiaries, so that the case stands the same as if the testatrix herself had appointed a trustee to distribute the fund. The trustee to be appointed

by the court will, in effect, be a trustee of her appointment, made through the Court of Chancery.

Courts incline strongly in favor of charitable gifts, and take special care to enforce them. As observed by Mr. Perry (sec. 687), charitable bequests are said to come within that department of human affairs where the maxim, *ut res magis valeat, quam pereat*, has been, and should be, applied; and further (sec. 690), that until the statute of distributions (22 Car. 2, chap. 13) was enacted, the ordinary was obliged to apply a portion of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man. This shows the favor in which charity is held in the law. There is to be the most liberal construction of the donor's intention, in support of a charitable donation. Charities have always received a more liberal construction than the law will allow in gifts to individuals. (2 Story's Eq. Jur. sec. 1165.) The charity here is not vague and indefinite, but quite specific,—to the worthy poor of the city of La Salle. Individuals of the class named will ever be readily found to whom the fund may be distributed. The trust is not difficult of execution, according to the intention of the testatrix. Instead of herself naming a trustee to make the distribution of her bequest, the testatrix preferred that its distribution should be made by a Court of Chancery, whose peculiar province it is to effect the administration of trusts, and especially charitable trusts. There can be no doubt that the execution of the trust by such court would be to effectuate the donor's intention;—the aim which is always sought to be accomplished.

Under the principles, and the strong current of authorities, which are properly applicable, we are fully satisfied that the bequest in question is a valid, charitable gift, and that it should be carried into effect by a Court of Chancery, as the testatrix expressly willed that it should be. The residuary clause of the codicil being held valid, it follows that the complainants take nothing as heirs-at-law, and are not entitled to maintain their bill.

The decree of the Circuit Court will be reversed, and the cause remanded to that court with directions to dismiss the bill.

Decree reversed.

MR. JUSTICE SCHOLFIELD: I do not concur in this opinion. I hold that courts of equity, in this State, exercise no prerogative powers, but, as contradistinguished therefrom, only judicial powers; that, not exercising prerogative powers, the court could not, by the act of the individual, be, and here is not, invested with a power not judicial, namely, that of selecting or designating the "worthy poor" to be the recipients of the testatrix's bounty; and that since it has not been and could not be invested with such power, it can not appoint and invest a trustee with such power. I concede the *testatrix* might have invested a *trustee* with such power, leaving and directing the court to appoint the trustee; but that is a very different case.

Charitable trusts.—Uncertainty of beneficiaries.—A charity, in a legal sense, may be defined as a gift for the benefit of an indefinite number of persons, *Jackson v. Phillips*, 14 Allen, 556, and this indefiniteness is said to be of the essence of a charitable bequest. *Salstonal v. Saunders*, 11 Allen, 456.

So that when the recipients of the testator's bounty are defined with certainty, the trust is rather private than public. As has been aptly said, "Charity begins where uncertainty begins." *Perry on Trusts*, § 687; *Fontain v. Ravinal*, 17 How. 369. If the bequest be made to a person who is vested with a discretion over its application, it is immaterial how vaguely the objects of the charity may have been described. *Missionary Society's Appeal*, 30 Pa. St. 425. And even in the absence of any provision for a trustee to administer the charity, the intention of the testator will be carried into effect by the appointment of a trustee for that purpose, or by acting itself in the place of a trustee. 2 *Redfield on Wills*, 805; 2 *Pomeroy's Eq. Jur.* §§ 1025, 1026; *Brown v. Kelsey*, 2 Cush. 248; *Washburn v. Sewall*, 9 Metc. 280, and authorities cited in the principal case. But see *Treat's Appeal*, 30 Conn. 113; *Fairfield v. Lawson*, 50 Conn. 501; *Coit v. Comstock*, 51 Conn. 352; *Goodell v. Union Association*, 29 N. J. Eq. 32; *De Camp v. Dobbins*, 29 N. J. Eq. 26; *Hesketh v.*

Murphy, 86 N. J. Eq. 304; *Erskine v. Whitehead*, 84 Ind. 387; *Miller v. Teachout*, 24 Ohio St. 525; *Sowers v. Cyrenius*, 39 Ohio St. 29; *Simpson v. Welcome*, 72 Me. 496; *Brown v. Yeall*, 7 Ves. 50; *Perry on Trusts*, §§ 722, 727; *Moore v. Moore*, 4 Dana, 854; *Starkweather v. Bible Society*, 72 Ill. 57.

In the construction of such gifts, the courts exercise the utmost liberality to give effect to the intention of the testator. *Clement v. Hyde*, 50 Vt. 716; *McAllister v. Hein*, 46 Vt. 274; *Button v. Tract Society*, 28 Vt. 336; *Burr v. Smith*, 7 Vt. 241; *Dodge v. Williams*, 46 Wis. 70. Accordingly it is found to be well settled, both in England and in most of the American States, that imperfect descriptions of the objects of charitable bequests do not render the gift void for uncertainty, unless it be impossible to ascertain whom the testator intended as the recipients of his bounty. *Congregational Society v. Hatch*, 48 N. H. 394; *Smith v. Smith*, 4 Paige, 271; *Story's Eq. Jur.* § 1181.

Thus devises to "the poor;" *Attorney-General v. Rance*, 1 Ambl. 422; *Legge v. Asgill*, Turn. & R. 265; to the poor inhabitants of a certain place; *Attorney-General v. Clarke*, 1 Ambl. 422; *Heuser v. Harris*, 42 Ill. 425; *Prickett v. People*, 88 Ill. 115; "to the poor pious persons, male and female, as the executors see fit, not omitting large and sick families, if of good character;" *Nash v. Morley*, 5 Beav. 177; "to buy bibles and to be divided among poor pious persons;" *Attorney-General v. Stepney*, 10 Ves. 22; "to the poor members of the Friend's Society;" *Magill v. Brown, Bright*, 347; "for promoting charitable purposes;" *Waldo v. Caley*, 16 Ves. 206; "to be used in the education and tuition of worthy indigent females;" *Dodge v. Williams*, 46 Wis. 70; "for the relief of indigent widows and orphans of the city of S.;" *Jones v. Habersham*, 107 U. S. 174; to be expended "in the purchase and distribution of such religious books or reading as they shall deem best and as fast as the funds shall come into their hands;" *Simpson v. Welcome*, 72 Me. 496, have been sustained.

See, also, *Cruikshank v. The Home for the Friendless*, *supra*, 346, and the cross-references.

DECKER vs. DECKER.

[121 Illinois, 341.]

LATENT AMBIGUITY.—BEQUEST OF "MONEY."—DEBTS AND FUNERAL EXPENSES A CHARGE ON THE REALTY.—AFTER-ACQUIRED PROPERTY.

Extrinsic evidence is admissible to explain a latent ambiguity, but not to contradict or add to the terms of a will. The word "money" is presumed to have been used by the testator in its ordinary or usual significance, and, in the absence of a contrary intention in the context, cannot include the general personal estate. But a bequest of money "remaining," where a contrary interpretation would leave a part of the estate undisposed of, may signify the residue of the property, and after-acquired property may pass under such a residuary clause.

WRIT OF ERROR to the Circuit Court of Cass County.
The facts are disclosed in the opinion.

R. W. Mills and *James McCartney*, for the plaintiff in error.

Morrison & Whitlock, for the defendants in error.

SHOPE, J. This writ of error brings before us for review a decree of the Circuit Court of Cass county, giving construction to the last will and testament of John Decker, late of Cass county, deceased. The testator, at the time of his death, left Oliver Decker, a son, and Rosina and Homer Decker, two minor grandchildren, his only lineal descendants, and devisees under the will. Oliver was of full age, and is made executor of the will. The estate of the deceased, at the time of his death, consisted of a number of tracts of land, and something over \$8,000 in personal property, consisting chiefly of \$368.70 cash, and \$7,592.75 loaned money. Besides this, there were various articles of household furniture, and other articles of but little value, the whole of which were perhaps worth but little, if anything, over \$100. The condition of the estate at the time the will was made was about the same that it was at the time of the

testator's death, the only difference being, the amount of loans was somewhat increased by the accumulations of interest.

As questions are raised on the argument upon all the clauses of the will, it can be considered more conveniently by setting the instrument out *in extenso*. Omitting the formal parts at the beginning and conclusion, it is as follows:

"First. After the payment of funeral expenses and just debts, I give, devise, and bequeath to my son, Oliver Decker, a part of my real estate, to wit: The southeast quarter of the southeast quarter of section 19, and the west half of the northeast quarter of section 29; also, twenty acres off the west half of the northeast quarter of the northeast quarter of section 33,—all in township 18 north, range 11, west of the third principal meridian.

"Second. My granddaughter, Rosina Decker, shall have the west half of the northeast quarter of section 28, thirty acres off the east half of the northwest quarter of section 28, thirty acres off the east half of the northeast quarter of section 29, thirty acres off the northeast quarter of the southeast quarter of section 28, all in same town and range,—the last mentioned lot to contain forty acres, more or less,—and west half, northwest quarter, of section 28, same town and range.

"Third. That the following property be equally divided between my son, Oliver Decker, and my granddaughter, Rosina Decker: The northeast quarter of the northeast quarter of section 27, and sixteen acres off the north side of the northwest quarter of the northeast quarter of section 27, and twenty-two acres, part of the northwest quarter of the northeast quarter of section 27, township 18, range 10, which lies south of sixteen acres off the north side of said northwest quarter of the northeast quarter of said section 27, and the north end of the southwest quarter of the northeast quarter of section 27, containing twenty-six and one-half acres.

"Fourth. My grandson, Homer Decker, shall have all

my real estate remaining and belonging to me, after taking therefrom the real estate bequeathed to my son, Oliver Decker, and granddaughter, Rosina Decker.

"Fifth. If there is any money remaining after my death, it shall be equally divided between Rosina Decker and Homer Decker."

As the most important question, and the one about which we have had the greatest difficulty in arriving at a satisfactory conclusion, arises on the construction of the fifth clause, that clause will be considered first.

The difficulty consists in determining what the testator intended by the expression, "any money remaining after my death." It is clear enough that whatever was intended to be embraced within that description, was to be divided between the two grandchildren. Plaintiff in error contends that the testator intended by it to include the amount of actual cash in his possession at the time of his death, and nothing more. Defendant in error, on the contrary, maintains, that by the expression in question, the testator intended to include, not particularly the amount of cash on hand at the time of his death, but the residue of his entire personal estate after the payment of all debts and funeral expenses. The general rule undoubtedly is, that a simple bequest of money, in the absence of anything in the context to show that the word "money" is used out of its ordinary or popular signification, will not include personal estate in general, but will be confined to money strictly so called. (2 Williams on Executors, *1190.) On the other hand, it is equally clear that the word "money" or "moneys" is often employed in making testamentary disposition under circumstances hardly distinguishable from the present, in the general sense of property or personal estate. When the term is thus used, it most generally has reference to the residuum of the personal estate after certain charges upon it have been satisfied, such as the payment of funeral expenses and the like, as is claimed to be the case here. Moreover, the examination of the cases will show, that generally, where this construction has been adopted, the con-

trary view would have resulted in leaving a portion of the testator's estate undisposed of by the will,—a view which courts are always disinclined to adopt, on the ground that it is contrary to the presumed intention of the testator. Such would be the case here if the word "money," as it occurs in the fifth clause of the will, is to be restricted to cash in the actual possession of the testator at the time of his death. After a careful consideration of the entire will, in the light of the authorities bearing upon the question, we are satisfied that both of the circumstances mentioned as having a controlling influence with the courts in construing the word "money" in its enlarged or extended sense, are present in this case, and therefore demand that construction. That the construction contended for by the plaintiff in error would result in making the great bulk of the personal estate intestate property, is manifest. That the term "money," in the connection used, was intended to express the residuum of the personal estate after the payment of all debts and funeral expenses, is strongly fortified by the implication arising from the use of the qualifying word "remaining," is equally clear.

This conclusion, however, is sought to be overcome by what we regard as a very strained and unnatural construction of the first clause of the will. The claim is, that the payment of the debts and funeral expenses is, by the introductory words of the will, made an express charge upon the real estate, to the exclusion of the personal estate. We perceive nothing in the language relied on that warrants such a conclusion. The fact that the dispositions of the will, including both realty and personalty, are preceded by the formula, "after the payment of funeral expenses and just debts, I give," etc., indicates no purpose on the part of the testator to specially charge his realty with such debts and expenses. The manifest intention of the testator in using the language in question was, to make all the bequests of the will, whether of personalty or realty, subject to the payment of his debts, leaving it to the law to determine the order in which the real and personal assets should

be liable. And since the law requires the personal assets to be exhausted before resort can be had to the realty (a fact which we must presume the testator had in his mind at the time of drawing his will), the reason is apparent why the final bequest in the fifth clause is preceded by the qualifying expression, "if there is any money remaining," etc. We are unable to perceive anything to which the word "remaining," as it occurs in the fifth clause of the will, could refer, except the residue of the personal estate after the payment of debts and funeral expenses; and hence we conclude that the term "money," qualified as it is by the word "remaining," was used to signify such residue. And our conclusion in this respect is strongly fortified by the further consideration, that any other construction would lead, as we have already seen, to making the great bulk of the personal estate intestate property.

In addition to this, we think the use of the expression, "money remaining," instead of, "personal estate remaining," or some like expression, is sufficiently accounted for by the fact that the great bulk of the personal property consisted, as is commonly said, of *loaned money*. This was true both at the time of making his will and at the time of his death. It was in this peculiar sense he doubtless used the word "money," as it covered, appropriately enough, all his personal estate, except a few insignificant chattels. Moreover, we think this view of the question is fully sustained by the authorities. (Redfield on Wills, 442; 2 Jarman on Wills, *768, *et seq.*; *Higgins v. Dwen*, 100 Ill. 554; *Smith v. Smith*, 17 Gratt. 268; *Irwin v. Zane*, 15 W. Va. 646.)

The next question to be considered arises under the first clause of the will. By it there is given to plaintiff in error "twenty acres off the west half of the northeast quarter of the northeast quarter of section 33," township 18 north, range 11, west of the third principal meridian.

The evidence shows that the testator never owned the northeast quarter of the northeast quarter of this section

33, or any part of it; but it also shows that he did own the northwest quarter of the northeast quarter of that section. So far as appears from the record, the only lands owned by the testator in section 33 was the northwest quarter of the northeast quarter,—forty acres. No part of it was specifically devised or otherwise referred to in the will, and the same would, therefore, pass, under the fourth clause of the will, to the residuary legatee, unless it shall appear to have been devised to plaintiff in error, as is contended by his counsel, under the first clause of the will above quoted.

There is said to exist a latent ambiguity, arising under the evidence *dehors* the will; and that the provisions of the will, read in the light of this extrinsic evidence, sufficiently make it appear that the devise to plaintiff in error, under this first clause of the will, was of a part of this northwest quarter of the northeast quarter of said section 33. While the general rule undoubtedly is, that the intention of the testator is to be gathered from an inspection and consideration of the will, and from no other source, in case of latent ambiguity courts do and must listen to extrinsic evidence,—not for the purpose of contradicting or adding to the terms of the will, nor to wrest the words of the testator from their natural operation, but for the purpose of determining the existence or non-existence of latent ambiguity, (for a latent ambiguity can only be shown by extrinsic evidence), and for the further purpose of enabling the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, whereby to determine the intention of the testator. (*Gilmer v. Stone*, 120 U. S. 586.) “The law is not so unreasonable,” says Mr. Wigam, “as to deny to the reader of an instrument the same light which the writer enjoyed.” (*Wigam on Wills*, 2 Am. ed. 161; see, also, *Brearley v. Brearley*, 1 Stockt. Ch. 21; *Perry v. Hunter*, 2 R. I. 80.)

It is further to be observed, that as a latent ambiguity is only disclosed by extrinsic evidence, it follows, that if removable at all, it may be removed by extrinsic evidence.

(*Patch v. White*, 117 U. S. 210.) Mr. Redfield, in his work on Wills (volume 1, page 584), lays down the rule, that where the description of the object or subject of a devise is erroneous and mistaken, extrinsic evidence is admitted to aid the construction, by showing to whom or to what the testator must have referred.

Latent ambiguities, as found by Chief Justice Tindal, in *Miller v. Travers* (8 Bing. 244), and which might be explained by parol, fall into two classes: First, where the description of the devisee or subject matter of devise is clear on the face of the will, but on inquiry it is found that the words describe two or more persons or things with equal accuracy, so, unless it can be shown, by extrinsic evidence, to which the testator intended his words to apply, the devise must fail for uncertainty; and second, where the description of the devise or of the devisee is correct in part and in part incorrect, as, where devisee's name is correctly given, but his residence, or some other circumstance descriptive of the person or thing, is incorrect. And the modern state of the law upon this subject is well illustrated in the recent opinion of the Supreme Court of the United States, wherein Mr. Justice Bradley, speaking for the court, said: "It is settled doctrine, that . . . such an ambiguity may arise upon a will, either when it names a person as the object of the gift, or a thing as the subject of it, and there are two persons or things that answer such name or description; or secondly, it may arise when the will contains a misdescription of the object or subject, as, where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect,—either circumstances, or declarations of the testator. (1 Jarman on Wills, 370; Hawkins on Wills, 9, 10.) Where it consists of a misdescription, as before stated, if the misdescription can be struck out, and enough remain in the will to identify the person or thing,

the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected." (*Patch v. White*, 117 U. S. 210.)

Tested by these principles, it is very clear, that in the devise under consideration there is a latent ambiguity. On the face of the will the subject matter of the devise is clear, but on inquiry it is found that the descriptive words of the devise are, in part, false,—the parcel of land appearing to be devised did not belong to the testator. If, then, we may strike out of the description of the premises appearing to be devised, so much as is false, and enough remain in the will, interpreted in the light of surrounding circumstances at the time the will was made, to identify the premises devised, this case will fall within the class of cases of which *Patch v. White* (*supra*); *Allen v. Lyons* (2 Washb. C. C. 472); *Winkley v. Kaime* (32 N. H. 268); *Riggs v. Myers* (20 Mo. 299); *Orphan Asylum v. Emmons* (3 Bradf. 144); *Townsend v. Downer* (23 Vt. 225); *Doe v. Roe* (1 Wend. 541); *Mann v. Mann* (1 Johns. Ch. 234); *Woods v. Moore* (4 Sandf. 579); and *Emmert v. Hays* (89 Ill. 12), are examples as to the subject devised, and *Gilmer v. Stone* (*supra*); *Vernon v. Henry* (3 Watts, 385); *In re Gregory* (34 Beav. 600), and *Button v. Tract Society* (23 Vt. 336), are examples as to the object of devise.

As indicative of the extent to which these principles have been carried by courts of the highest respectability, and as showing the current of authority, we select a few examples of their application. In *Patch v. White* the testator said, "and touching my worldly estate, I give, devise and dispose of the same in the following manner." He devised specific lots to near relatives, and, among others, to his brother "lot numbered 6, in square 403." He then gave to his son "the balance of my real estate, believed to be and consist of" certain named lots, but not mentioning lot 3, in square 406. And it was held that the testator intended to dispose of all his real estate, and thought he had done so; that in the devise to his brother he believed he was giving his brother one of the lots he owned; that evi-

dence might properly be received to show that the testator did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406, and that the evidence, in connection with the context of the will, sufficiently showed an error in description, and that the lot really devised was lot 3, in square 406. *Allen v. Lyon* was a devise of a house and lot in Fourth street, Philadelphia, in the occupation of R. H. It appeared from the evidence that the testator did not own a house and lot in Fourth street, but did own a house and lot in Third street occupied by R. H., and it was held that the latter property passed under the will. *Winkley v. Kaime* was a devise of thirty-six acres of lot 37, in the second division in Barnstead, being the same testator purchased from J. P., and the evidence showed there was no such lot in the second division in that town, but that testator owned a part of lot 97 in that division, purchased from J. P. Held, that the part of lot 97 owned by testator, passed under the will. In *Orphan Asylum v. Emmons*, the testatrix devised her shares of the Mechanics' Bank stock. She had no bank stock except shares of the City Bank. Held, that the word "Mechanics'" must be rejected as inapplicable to any property owned by testatrix, and the rejection of the word left the bequest to operate upon any bank stock possessed by her, and so passed the City Bank shares. And in *Riggs v. Myers*, the devise was of the south-east and south-west quarters of section 4, town 60, range 38, devisee of the south-west quarter to have access to the Big Spring. Parol evidence was heard showing the testator never owned any land in section 4, town 60, range 38, but did own the south-east and south-west quarters of section 4, town 59, range 38, the south-west quarter of which was accessible to a big spring, and it was held that the latter quarter sections passed under the will.

And as to the identity of the object of the devise, the following may be taken as examples: *Gilmer v. Stone*. Here the bequest was of the testator's residuary estate, "to be equally divided between the Board of Foreign and the Board of Home Missions." The evidence showed several

religious denominations, including the Presbyterians, had boards of home and foreign missions; that the testator was an elder in a Presbyterian church, and had, in his lifetime, always sent his contributions for home and foreign missions to the Presbyterian boards, and had contributed nothing to the mission boards of other denominations; and it was held, that this evidence, in connection with other bequests in the will made to the Presbyterian church, showed that the Presbyterian boards of home and foreign missions were the ones intended, and entitled to receive the bequest. And in *Vernon v. Henry*, a legacy was given to James Vernon Henry, described as a nephew of the testator, and son of the testator's deceased sister, Elizabeth. The legacy was claimed by James Vernon Henry, a *grand*-nephew of the testator and *grand*-son of Elizabeth, and also by Robert R. Henry, nephew of the testator, and only living son (at date of will) of Elizabeth. On intrinsic evidence, James was held entitled to the legacy. (See, also, 1 Jarman on Wills, 376, *et seq.*)

It is to be noted that the principle of construction contended for as applied to wills, has been recognized by this court in the case of deeds. (See *Myers v. Ladd*, 26 Ill. 415, and *Swift v. Lee*, 65 Id. 336.)

In every case calling for construction, the question of first importance is, what was the testator's intention. As was said in *Finlay v. King's Lessee* (3 Pet. 346): "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected, or some restrained in their application, as materially to change the literal meaning of the particular sentence." But the embarrassment, in every case, arises in determining the just limitation upon judicial inquiry as to intention. We have seen that in case of latent ambiguity, as in the present case, where it is shown that the description of the subject of the devise, as it appears on the face of the will, is false, in part, courts may look beyond the words of the

will,—may place themselves in the position occupied by the testator when he executed the will, and view the testator's affairs as he viewed them, the better to determine the intention of the testator from the language of the will, after excluding what is shown to be false. This is all it is contended the court should do in this case, and to this extent, under the authorities, we may most certainly go. If, then, it shall appear, after rejecting the false words of the description, that sufficient remains to identify the lands intended to be devised, effect must be given to the devise accordingly.

It seems clear to us, from the will itself, that the testator intended to devise all his estate. Not only so, but it was his intention to devise "my real estate,"—not real estate which he did not own. It seems very clear to us, also, that he intended his son, plaintiff in error, should be a prominent sharer in his bounty. It seems to us certain that testator intended to devise lands owned by him in town 18, north of range 11, west of the third principal meridian; also, lands lying in section 33, in the same town, and owned by him; also, lands lying in the north-east quarter of said section, and owned by him; and also twenty acres off the west half of his lands in said quarter section. The testator in fact possessed just such lands, and we can not doubt, in the light of these facts, that the parcel of land in the mind of the testator when he made his will, was the twenty acres off the west half of the north-west quarter of the north-east quarter of section 33, town 18, range 11, because this tract of forty acres was the only tract owned by him lying in the north-east quarter of said section, or, indeed, anywhere in the section. This conclusion is reached, not by adding to the terms of the will,—not by inserting what was by mistake left out of the will, and thereby reforming it,—but by rejecting, or refusing to give effect to, the words "*of the north-east quarter,*" where they occur for the first time in the description. And this rejection is made because it is conclusively shown that to this extent the description of the devise is false in fact. The township and range is

certain ; the section therein is certain ; the quarter-section within the section is certain ; the only land possessed by testator within the quarter section is certain ; and the part off the west side of the testator's lands in the quarter section is also certain. Under such circumstances there can not be said to be any uncertainty as to the premises intended by the testator to be devised to his son. It was twenty acres off the west half of the north-west quarter of the north-east quarter of section 33. In thus giving effect to the devise, the false part of the description is rejected, and effect given to that part which is true ; and this is done without, in the slightest degree, violating any positive rule of law or accepted canon of construction.

But it is insisted that the principle of *Kurtz v. Hibner* (55 Ill. 514) is at variance with the views here expressed. An examination of the facts of that case will, we think, conclusively show that it is clearly distinguishable from the case now under consideration. In that case the frame of the bill and the offered evidence all proceeded upon the theory that a court of chancery might reform the will by correcting a mistake in description. The offer was to prove "that a mistake was made in drafting the will, by the insertion of the words *section thirty-two*, instead of *section thirty-three* ;" that devisee "had been in the actual possession of the tract for a number of years, and upon the repeated promise of the testator, in his lifetime, that he would give the same to " devisee, she had made lasting and valuable improvements. And as to the other tract, the offer was to prove that devisee, at the death of the testator, "was in the actual possession of the forty-acre tract as the tenant of the deceased, and that the draughtsman of the will, by mistake, inserted the word *one*, after the words *section thirty*, instead of *two*, so as to bequeath to James land in section 31 instead of section 32." There was no pretence, in that case, that by rejecting so much of the description as was false, enough of the description remained so as that the lands devised could be identified. The moment that the numbers of the sections were rejected, the devise failed for un-

certainty. The only means of identification furnished by the description of the will lay in the numbers of the sections, as was said in *Bowen v. Allen* (113 Ill. 53). When they were rejected, nothing was left by which the lands intended to be devised could be located within any one of the thirty-six sections in the township, unless new numbers of sections could be inserted in the description. To have done that would have been to add to the will, to substitute words not used by the testator, in place of those used by him,—in effect, to make a will for the testator. Wills are required by statute to be in writing, and courts are without the power of substituting for the written words of the testator, other and different words not used by him. Then, to permit the substituting of words not used, in place of words used, would not only render this provision of law inoperative, but it would overthrow the Statute of Frauds, and again open the door to all the evils that that law was intended to prevent. Every consideration impels us to deny the power of courts to add to or reform a will on the ground of mistake. The *Kurtz case* goes upon this principle, and finds support in the following American cases: *Fitzpatrick v. Fitzpatrick* (36 Iowa, 674); *Hill v. Fenton* (47 Ga. 455); *Sherwood v. Sherwood* (45 Wis. 357).

It is also objected, that the decree gives to Rosina Decker the north-east quarter of the south-east quarter of section 28, etc., whereas, by the second clause of the will she is only given thirty acres of that forty-acre tract. There is certainly much force in the position of counsel for plaintiff in error in respect to this branch of the case; but we agree with counsel for the defendants in error, that conceding the error to exist, it is not one of which plaintiff in error can take advantage, for it in nowise affects him. It is a familiar doctrine, that one will not be heard to complain of an error that does not injuriously affect himself.

It appears that after the execution of the will the testator exchanged the tract of land given by the third clause of the will to Oliver Decker and Rosina Decker, for a couple of lots in Hall's addition to the town of Virginia,

which, by the decree, were given to Homer Decker, the residuary legatee. It is claimed by plaintiff in error, that by the transfer of the land the third clause of the will became void, by reason of there being nothing for it to operate upon, and that the after acquired lots could not pass by the residuary clause of the will,—or, in other words, that the lots received in exchange for the land descended to the heirs as intestate estate. We discover nothing in the will itself to indicate that it was the intention of the testator that it was to be confined in its operation to such lands as the testator owned at the time of the execution of the will. In the absence of anything to indicate such an intention, we perceive no reason why, under our statute, after acquired property will not pass, under the will, in the same manner as property owned by the testator at the time of its execution. The words of the statute are, that “testator shall have power to devise all the estate . . . which she or he hath, or at the time of his or her death shall have, in any lands,” etc. (See Rev. Stat. chap. 148, sec. 1.) The language of the statute on this question is too plain to admit of serious discussion. (See, in this connection, *Willis v. Watson*, 4 Scam. 64; *Peters v. Spillman*, 18 Ill. 370.)

The circuit court erred in rejecting the offered evidence, and in not decreeing that plaintiff in error took, under the first clause of the will, twenty acres off the west half of the north-west quarter of the north-east quarter of section 33. The decree of the circuit court is therefore reversed to the extent indicated, and the cause is remanded, with directions to enter a decree in conformity with this opinion. In all other respects the decree of the circuit court is affirmed.

Decree reversed in part and in part affirmed.

See, also, *Gilmer v. Stone*, 5 Am. Prob. Rep. 68; *Hinckley v. Thatcher*, 4 Id. 483, and the note; *Appel v. Byers*, 3 Id. 1; *July v. Gilbert*, 2 Id. 89; *Morse v. Stearns*, Id. 51; *Hammond v. Hammond*, Id. 119; *Sewell v. Slingluff*, Id. 597; *Griscom v. Evens*, 1 Id. 130; *Stannard v. Barnum*, Id. 160; *Allen v. Allen*, Id. 479; *Burnet v. Burnet*, Id. 539, and the note; *Eberts v. Eberts*, Id. 559; *Reynolds v. Robinson*, Id. 538; *Beach on Wills*, §§ 274, 275.

COWLES *vs.* COWLES.

[56 Connecticut, 240.]

GENERAL LEGACY.—SUBSTITUTION.—ADEMPTION.

Where a testator in his lifetime makes a gift to a person to whom by his will he has given a general legacy, with the intent that it should be a satisfaction of or substitute for the legacy, the gift will operate as an ademption of the legacy. The intent of the testator is the decisive thing in the matter; the assent of the legatee is not necessary.

SUIT for the construction of a will. The case is stated in the opinion.

J. Huntington and *A. D. Warner*, for the plaintiff.

H. C. Robinson and *W. Cothren*, for the defendants.

PARK, C. J. The controversy in this case grows out of certain bequests in the will of David M. Cowles, late of the town of Bethlehem in this State. They are as follows:—

“I give to my son, Horace Cowles, ten thousand dollars; to him, his heirs and assigns forever.

“I give to my two daughters, Wealthy C. Porter, the wife of John Porter, and Mary, wife of William Bassett, five thousand dollars worth of bank stock to each of them, in trust. Each is to have and enjoy, during her natural life, all the profits and uses of five thousand dollars worth of bank stock, and at the decease of either, as it shall occur, their share of this bequest shall be divided equally between all my grandchildren, so soon as they shall attain the age of twenty-five years respectively; to them, their heirs and assigns forever; the worth of said bank stock to be determined by its market value at the time of my decease, and, when so determined, five thousand dollars worth of said stock shall be set out to each of my above-mentioned daughters for the uses and purposes aforesaid.

“I give all the rest and residue of my estate to my ex-

ecutor, in trust, for the benefit of my grandchildren, to be securely invested as he shall think best ; the principal and profits to be divided equally between said grandchildren as they shall respectively arrive at the age of twenty-five years ; the share of each grandchild to be determined by a division of the whole amount of the fund then existing by the number of said grandchildren to whom no share has been distributed, and the result shall be the share to which each is entitled ; to them, their heirs and assigns forever."

After the will was made the testator paid to his son, Horace Cowles, thirteen thousand five hundred dollars, in full satisfaction and discharge of the legacy given him in the will, and of all his right, title and interest in the testator's estate after his decease. The following writing was given by the said Horace to his father and received by him when the money was paid :

"Received of David M. Cowles thirteen thousand and five hundred dollars, it being in full of all my rights, claims and demands upon my father's, David M. Cowles's, estate, by will, inheritance or in any other way. Dated Bethlehem, April 16th, 1880. HORACE COWLES."

After the decease of the testator the executor of his will presented this instrument to the said Horace in full payment of the legacy bequeathed to him in the will, but he refused to accept it ; and this raises the second question presented by the executor for our advice, namely ;

Whether the legacy given in the will to the said Horace Cowles has been adeemed, satisfied or discharged by the execution and delivery of the receipt to the testator in his lifetime ; and has he any claim on the executor as legatee ?

The answer to the question depends upon the intent of the testator in advancing the money to his son. Although he had made his will and in it had given a legacy of money to his son, still that legacy remained subject to his absolute control. He could at any time revoke it in the manner prescribed by the statute ; he could satisfy and discharge it, by advancing a sum of money in lieu thereof, so that after his decease it would be void, and be merely evidence

of what he had done for his son. All this he might do without any action of the son, and without his consent or approbation. The property was his own, and he could do with it in this regard as he pleased. The case of *Richards v. Humphreys* (15 Pick. 133), is precisely in point. The court there says :—"The only question left for the decision of the court in the present case is, whether the payment made by John Hawes, the testator, in his lifetime, to Mrs. Richards, the present plaintiff, under the circumstances in proof, amounts to an ademption, *pro tanto*, of the legacy now sued for. The ademption of a specific and of a general legacy depends upon very different principles. A specific legacy of a chattel, or of a particular debt or parcel of stock, is held to be adeemed when the testator has collected the debt or disposed of the chattel or stock in his lifetime, whatever may have been the motive or intent of the testator in so doing. But when a general legacy is given of a sum of money out of the testator's general assets, without regard to any particular fund, intention is of the very essence of ademption. The testator during his life has the absolute power of disposition or revocation. If he pays a legacy in express terms during his lifetime, although the term 'payment,' 'satisfaction,' 'release' or 'discharge' be used, it is manifest it will operate by way of ademption, and can operate in no other way, inasmuch as a legacy, during the life of the testator, creates no obligation upon the testator or interest in the legatee, which can be the subject of payment, release or satisfaction. If, therefore, a testator, after having made his will containing a general bequest to a child or stranger, makes an advance, or does other acts, which can be shown by express proof to have been intended by the testator as a satisfaction or discharge of, or a substitute for, the legacy given, it shall be deemed in law to be an ademption of the legacy. Hence it is that when a father has given a child a legacy as a portion or provision for such child, and afterwards, upon the event of the marriage of the child, or other similar occasion, makes an advance to such child as and for such portion or provision, though to a

smaller amount than the legacy, it shall be deemed a substitute for the provision contemplated by the will, and thence as an ademption of the whole legacy. This is founded on the consideration that the duty of a father to make a provision for his child is one of imperfect obligation and voluntary, that his power of disposing is entire and uncontrolled, and that he is the best and the sole judge both of his ability in this respect and of the amount which it is proper for him to appropriate to any one child as such provision. . . . His original intent in making such provision by will is accomplished, his purpose in giving the legacy is satisfied, and of course the law concludes that the legacy itself is adeemed. And if the portion subsequently given as provision made in the lifetime of the testator is less than the legacy, still it operates as an ademption of the whole legacy, not because a smaller sum can be a payment of a larger, but because it manifests the will and intent of the testator, who is the sole disposer of his own bounty, to reduce the amount of the provision contemplated when he made his will. From this point of view of the subject of ademption of general legacies, it seems manifest that the ademption takes effect, not from the act of the legatee in releasing the legacy or receiving satisfaction of it, but solely from the will and act of the testator in making such payment or satisfaction or substituting a different act of bounty which is shown by competent evidence to be intended as such payment, satisfaction or substitution. The question therefore is, whether from the facts shown in the present case it sufficiently appears that the advance of money made by the testator in his lifetime to his sister, was intended as a part payment and satisfaction of the legacy given to her by his will. If it was so intended the law deems it an ademption *pro tanto*."

This case answers the question under consideration fully, clearly and satisfactorily, and in this decision we fully concur.

The case of *Low v. Low* (77 Maine, 37), is another pertinent case. In that case a father gave his son a general

legacy of a specific sum of money, and another legacy in the residuary clause. After the will was made the testator paid the son a certain amount of money, and took from him a writing in which the son acknowledged that the sum of money was received by him in full satisfaction and discharge of the legacies given him in the will. The court held that the legacies were adeemed. (See, also, 1 Swift's Digest, 455 ; *Hartop v. Whitmore*, 1 P. Wms. 681 ; *Clarke v. Burgoyne*, 1 Dick. 353 ; *Clark v. Percival*, 2 Barn. & Adol. 660.) We think the legacy given to Horace Cowles was adeemed by the testator in his lifetime, by advancing to him the sum of money described in the document given by him to his father when the money was paid.

Although the language of the document purports to be the language of the son, still it shows clearly the purpose and intent of the father in advancing the money, for the son could not receive it for any other purpose than that for which it was offered, and having received it for the purpose of satisfying the legacy, it shows conclusively that it was offered for that purpose.

We therefore answer the question regarding the legacy to Horace Cowles, by saying that it was adeemed by the testator in his lifetime, so that the said Horace has no claim on the executor of his father's will as a legatee.

The next question presented for our advice is, "whether the bequest in the will to Wealthy C. Porter, the wife of John Porter, has been satisfied or discharged by the execution and delivery of the following document to the testator in his lifetime, and whether she has any claim upon the executor by virtue of the bequest given her in the will."

The document referred to is the following :

"Bethlehem, Conn., May 1, 1885. Received of my father, David M. Cowles, seven thousand dollars in full of all debts, dues and demands to date, and in full payment of all my right, title and interest in and to his estate, and in full of my reversionary or expected interest in his estate, by will or otherwise, and, in full of my distributive share in his estate. It being understood that this is binding upon me

and my heirs and assigns against all claims, contingent or otherwise, against my father, David M. Cowles, and against his executors, administrators and assigns upon his decease.

“WEALTHY C. PORTER [L. S.]”

The views we have expressed in relation to the legacy of Horace Cowles, apply with equal force to this legacy, and decide the question adversely to the legatee.

It is said that the money in this case was given in part to cancel “all debts, dues and demands” which the recipient had against her father, and that in this respect the question differs from the one we have considered. But we think there is nothing in this distinction. Confessedly a part of the money was advanced to cancel, satisfy and discharge the legacy given in the will. Whether that sum was less or more than the legacy was of no importance, as we have seen, for the testator had absolute control over it, to annul, satisfy or discharge it as he pleased, without the consent or approval of his daughter.

These remarks show further that there is no substance in the claim that, at the time the money was paid and the document given in exchange, the daughter was a *feme covert*, incapable of making a binding contract; for no contract whatever was necessary to be made with the daughter, and none was attempted to be made. The act of the testator was solely his own. (*Richards v. Humphrey, supra.*)

We therefore answer this question as we answered the one we have considered, that the legacy to Mrs. Porter was adeemed by the testator in his lifetime, and consequently she has no claim upon the executor of his will by virtue of the bequest.

It appears in the case that the testator died on the 17th day of January, 1886; that at that time one of his grandchildren was more than twenty-five years of age; and that a grandchild was born on the twentieth day of July of the same year. These facts raise another question in the case, namely: “Will the grandchild, born after the death of the testator, take any share in the residuary estate, inasmuch as

one of the grandchildren had arrived at the age of twenty-five years before the death of the testator?"

A child is considered in being from the time of its conception, where it will be for the benefit of the child to be so considered. Its conception is presumed to have occurred nine months previous to its birth, and where there is no evidence to rebut the presumption, it becomes conclusive. No such evidence appears in this case; indeed the grandchild was born about six months after the death of the testator, when it must have been about three months in being according to the presumption.

The authorities are numerous in support of the doctrine that a child will be considered in being from its conception, where the interest of the child so requires. The case of *Hall v. Hancock* (15 Pick. 255) is a strong case on the subject.

It is needless to multiply cases, for it is conceded that the grandchild, born after the death of the testator, should be considered in being for the purposes of this case, unless the fact that one of the grandchildren had arrived at the age of twenty-five years before the death of the testator makes the case an exception to the rule. The claim is that the class of grandchildren was made up at the death of the testator, inasmuch as one of them was then of sufficient age to take his share of the estate by distribution.

We see no substance in this claim. Suppose the class was made up at the death of the testator, as doubtless it was, the unborn grandchild was then in contemplation of law living and capable of becoming a member of the class as well as the others. (*Hall v. Hancock, supra.*)

We think, therefore, that the grandchild, William H. Cowles, born after the death of the testator, must, for all the purposes of this case, be regarded as embraced by the term "my grandchildren," as used in the residuary clause of the will; and so we answer the fourth, fifth, and sixth questions presented for our consideration and advice.

The seventh question presented by the executors is as follows:—"In the event of the death of any of said grand-

children before attaining the age of twenty-five years, will their heirs take the share of the deceased, and if so, when?" We answer by saying that we think the heirs will take the share of such grandchildren upon their death.

The property contained in the residuary clause of the will vested in the grandchildren upon the death of the testator; but the time when each should come into possession of his or her share was the time when each should attain the age of twenty-five years. Up to that age the testator preferred that the trustee should have the care and management of the property of each grandchild, rather than that the control of it should be committed to the child. But this requirement was confined to the grandchildren. On the death of one of them before attaining the age of twenty-five years, his or her heirs might be twice or thrice that age, and the reason that induced the testator to make the provision in regard to the grandchildren would not apply to such heirs.

The question is simply whether the trustee shall continue to have the care and management of the property of a deceased grandchild till such time as the grandchild would have attained the age of twenty-five years had he or she lived to that age, or whether the property shall go at once into the possession of the heirs upon the death of the grandchild. The question pertains to the custody of the property in the meantime. The amount of it would be the same when the grandchild would have attained the age of twenty-five years, whether the custody of the property should be in one or the other of the parties up to that time.

No good reason can be given why the provision in regard to the grandchildren should be extended to the heirs of deceased grandchildren, or why such heirs should be deprived of the possession of the property they inherit during such time as the grandchild from whom they inherit would have been deprived of it. We therefore say that the provision of the testator in regard to the time when the grandchildren should come into the possession of the property devised and bequeathed to them, exhausted itself upon the grandchildren; and that consequently the heirs of grand-

children who may die before they arrive at the age of twenty-five years, as well as afterwards, are entitled to the immediate possession of the property they inherit. And so we answer the seventh question submitted to us.

We passed by the first question submitted to us, with regard to the person who would be entitled to the legacy of ten thousand dollars given in trust for Oliver Cowles, in case he should die childless. As the case stands this question is a merely speculative one, and we leave it to be decided when, if ever, it shall become necessary.

In this opinion the other judges concurred.

See, also, *The State v. Crossley*, 1 Am. Prob. Rep. 418; *Van Houten v. Post*, Id. 422; *Allen v. Allen*, Id. 479; *Reynolds v. Robinson*, Id. 588; *Porter's Appeal*, 2 Id. 284; *Fennell v. Henry*, 3 Id. 216; *Simpson v. Simpson*, 4 Id. 435; *Rusling v. Rusling's Administrators*, 5 Id. 251; *In re Zeile*, *supra*, 108, and the note and the cross-references.

GENET vs. HUNT.

[118 New York, 158.]

TRUSTS.—PERPETUITIES.

Where an unmarried woman who, in anticipation of marriage, executes a deed of trust of all her property to certain trustees for her benefit during her lifetime, and upon her death to convey as by her will she should direct, subsequently there-to married and died leaving two children, and a will, by which she gave her estate in trust to her executors for the benefit of the children, with remainder, on the death of either, to her heirs or next of kin, it was *held* that the deed of trust created a valid and indefeasible estate in the trustees, which neither the settlor alone nor in conjunction with the trustees could abrogate, and that the trusts attempted to be created by the will were in contravention of the statute against perpetuities, because they constituted a suspension of the power of alienation for three lives, two of them not in being at the time of the creation of the power.

APPEAL from a judgment of the general term of the Supreme Court of the first judicial department. The terms of the trust as stated in the deed are as follows: "In trust, nevertheless, that the said parties of the second part, the survivors or survivor of them, his heirs, executors, administrators or assigns, shall and do receive the rents, issues, profits and income thereof, for these presents, if the said party of the first shall so long live, and in case she, the said party of the first part, shall marry within the said term of one year, then for and during the continuance of the coverture created by such marriage, and that the said parties of the second part, the survivors or survivor of them, his heirs, executors or administrators, during such term of one year, or during such coverture as the case may be, shall and do apply the said rents, issues, profits and income as received, and not by anticipation, to the sole and separate use of her, the said party of the first part, for and during the said term of one year or such coverture as aforesaid, in like manner as if she, the said party of the first part, were a *feme sole*, and in such manner as to be free from the control, disposition, debts or incumbrances of any husband she may marry within the said term of one year, and in case the said party of the first part shall be discoverd at the end of the said term of one year, or such marriage shall take place within that term, and she, the said party of the first part, shall survive her said respected coverture thereby created, then either of such events, upon this further trust that they, the said parties of the second part, the survivors or survivor of them, and his heirs, executors or administrators, shall and do forthwith, upon the expiration of the said term of one year or of such coverture, as the case may be, grant, convey, assure and deliver over absolutely to the said party of the first part, all and whatsoever may remain of the said hereby granted premises, and in case such marriage shall take place within the said term of one year, and the said party of the first part shall not survive her said coverture thereby created, then upon this further trust, that they, the said parties of the second part, the survivors

or survivor of them, his heirs, executors or administrators, do grant, bargain, assure and deliver all and whatsoever may remain of the hereby granted premises upon such devisee or devisees in such share or proportion as she, the said party of the first part, by her last will and testament, may direct, which will and testament she, the said party of the first part, is empowered, authorized and enabled to make, and by force of these presents, without any other or further reservation of power in that behalf, the same to alter, revoke and make anew with the same or different provisions from time to time and at all times during her said coverture, notwithstanding her said coverture, at her free will and pleasure, in like manner as if she was a *feme sole*, provided, nevertheless, that every such alteration or revocation be made in writing, subscribed by the said party of the first part, and attested by two subscribing witnesses. And provided further, that she, the said party of the first part, shall not, however, exercise at any time during such coverture any power of anticipation in respect to the said hereby granted premises, or any part thereof than is by these presents expressly reserved or granted unto her, the said party of the first part, and in default of any such direction or in respect to any of the said hereby granted premises, as to which there shall not be any such direction duly and effectually made, upon this further trust that upon the death of the said party of the first part discover, as aforesaid, within the said term of one year or afterwards during her said coverture, they, the said parties of the second part, the survivors or survivor of them, his heirs, executors or administrators, shall and do grant, convey, assure and deliver all and whatever may remain of the hereby granted premises, after satisfying any such direction that may be so made as aforesaid, of a part only of the said hereby granted premises, unto such person or persons living at the death of the said party of the first part, and being her heir or heirs-at-law, as would be entitled to take the same by descent from her, in case the same was land belonging to her, situate in the State of New York, and if more than one person, then

in the proportion in that behalf prescribed by the laws of the said State."

The contemplated marriage took place. Mrs. Riggs died in coverture in 1884, leaving two children surviving, and leaving a will executed in June, 1867, the terms of which, so far as material, are as follows :

"After the payment of all my just debts and funeral and testamentary charges, I direct my said estate to be set apart into two equal shares or portions for the benefit of my two children, George Field, and Mary Rebecca, respectively.

"I direct my executors and trustees hereinafter named, after the payment of said debts and expenses, to take the charge of all my property and estate above-mentioned, and to rent, manage and control the same, or to convert the same or such parts of the same as they shall think the true interests of the beneficiaries of my estate require, into bonds and mortgages or State or national securities, or in any or either of them, and the net income, rents and profits thereof, or as much as may be necessary therefor, I direct to be applied in equal parts to the support, maintenance and education of my two children, George Field and Mary Rebecca, until they shall respectively attain twenty-one years of age, and upon their respectively attaining twenty-one years of age, then to pay over to each child, after so attaining that age, the net income, rents and profits of one-half of said estate for his and her sole use and benefit during their respective lives, and after their deaths respectively, the respective shares of said estate set apart for them as above directed shall go to and belong to their heirs-at-law and next of kin, respectively, in the same manner as though they were respectively absolute owners of the same.

"In case of the death of either of my children before attaining lawful age and without issue, I direct the share set apart for the benefit of the one so dying to be applied to the use and benefit of the survivor in the same manner as is before provided in respect to their own share, but if the one so dying shall leave issue, then such issue shall be entitled to the same.

"In case of the death of both my children before attaining lawful age and without issue, then upon the death of the longest liver, I direct said property to be disposed of as follows :

"Out of the same, I direct that my brothers, M. Augustus and William, or in case of the death of them or either of them, their respective issue shall be paid one thousand dollars each, that is to say, one thousand dollars to M. Augustus, or in case of his death, that sum to his issue, in equal shares, and one thousand dollars to William in the same way. And the balance I direct to be divided into equal shares amongst my several brothers and sisters, including M. Augustus and William, and in case of the death of any of them leaving issue, then such issue shall take the part the parent would have taken if living.

"Should my executors and trustees, in the exercise of their best judgment, deem it prudent and for the true interest of my children, after they respectively attain lawful age, to make over to them, or either of them, any part of the principal of the estate before referred to, I authorize them to do so to the extent of the one-half part (or less) of the share set apart for their benefit, respectively, that is to say, to the extent of one-quarter of the whole estate, if both be living, or one-half in case one be dead, and if the conduct or situation of either of my said children, after he or she shall have attained thirty years of age, shall warrant it, and my executors and trustees shall, in the exercise of a sound judgment, deem it for their true interest, then I authorize them to make over to them or either of them, the balance or any portion of said estate set apart for their benefit as above."

George C. Genet, for the appellants.

Ernest H. Crosby, for the guardian *ad litem* of one of the children.

Franklin B. Lord, for the respondents.

ANDREWS, J. The question presented on this record is whether the trusts created by the will of Caroline M. Riggs, dated June 27, 1867, are valid within the law of perpetuities, or are void for remoteness. There can be no doubt that if the testatrix, at her death, was the absolute owner of the estate embraced in the trusts, they were valid both in respect of their purposes and duration. In general character they are trusts to apply the rents, profits and income of the trust estate for the support and maintenance of two children of the testatrix during their lives, respectively, with remainder on the death of either, of the share of the one so dying, to his heirs and next of kin, except that in case of the death of either child during minority and without issue, the whole estate is to be held in trust for the survivor during life, with remainder to his heirs and next of kin; and in case of the death of both children during minority and without issue, then, on the death of the longest liver, the whole estate is given absolutely to designated beneficiaries. Under the will the estate was to vest in absolute ownership, at the furthest, within the compass of the lives of the two children. The share of each child, provided he attained majority, would be liberated from the trust on his death, and the suspension of that share would in that event, be but for one life only. But if either child should die during minority without issue, there would be a further suspension of the absolute ownership of his share during the life of the survivor. As to each share, therefore, there might be a suspension for two lives, but this would be within the limit allowed by law. The statutory limit of suspension of the power of alienation of real estate is two lives in being at the creation of the estate and a minority (1 R. S. 723, § 15), and substantially the same rule applies to limitations of personal property. By another section of the statute (§ 41) it is declared that, "the delivery of the grant where an expectant estate is created by grant, and where it is created by devise, the death of the testator shall be deemed the time of the creation of the estate." There would be no difficulty in sustaining the lim-

itation in the will, if the period of suspension is reckoned from the death of the testatrix.

It is claimed, however, in behalf of the respondents, that the will of Mrs. Riggs was merely an execution of a power of appointment reserved in the trust deed of Jan. 6, 1853, made between the testatrix (then Caroline M. Field), of the first part, and George S. Riggs and others, of the second part, and not an exercise by her, as owner of the property, of the *jus disponendi* incident to ownership, and that the trusts created by the will were void under the statute of powers (1 R. S. 732), for the reason that they were limited upon the lives of persons not in being at the creation of the power, viz., upon the lives of the two children of the testatrix, who, though living when the will was made, were not born until long after the trust deed creating the power had been executed. By section 128 of that statute it is declared that "the period during which the absolute right of alienation may be suspended by an instrument in execution of a power shall be computed not from the date of the instrument, but from the time of the creation of the power." Section 129 declares that "no estate or interest can be given or limited to any person by an instrument in execution of a power, which such person could not be capable of taking under the instrument by which the power was granted." And by section 105 it is declared, in substance, that a power reserved is subject to the provisions of the article in the same manner as a power granted.

The trust deed was made in contemplation of the marriage of the settlor, Caroline M. Field, with George S. Riggs. Its leading purposes were to secure to the settlor the income of her property for her own benefit during the marriage, free from the control, disposition, debts or incumbrances of her husband, and to secure the principal to her if she survived her husband, or in case she should die during coverture, to her appointees by will, or if she should make no appointment, to such persons as at her death would be her heirs under the laws of New York, as if all the property was real estate. To secure these objects

the settlor conveyed by the trust deed to the trustees, all her real and personal estate in trust, to receive and apply the rents, issues, profits and income to her use as received, without power of anticipation during her coverture, and in case she survived her coverture, to reconvey the property to her; but in case she should die during coverture, then the trustees are directed to "grant, assure and deliver all and whatever may remain of the hereby granted premises unto such devisee or devisees, in such share or proportion as she, the said party of the first part, by her last will and testament, may direct, which will and testament," the instrument declares, "she, the said party of the first part, is empowered, authorized and enabled to make, and by force of these presents, without any other or further reservation of power in that behalf," etc. Then follows an alternative provision that in default of appointment, the property shall "go unto such person or persons living at the death of the said party of the first part, and being her heir or heirs-at-law, as would be entitled to take the same by descent from her in case the same was land belonging to her situate in the State of New York, and if more than one person, then in the proportion in that behalf prescribed by the laws of said State.

The trust deed created a valid trust for the joint lives of Mrs. Riggs and her husband, or during coverture, if she should become discoverd by the death of her husband before her death. It was one of the express trusts authorized by statute to receive the rents and profits of lands and apply them to the use of any person during the life of such person, or for a shorter period (1 R. S. 728, § 55, subd. 3), and suspended the power of alienation of the real estate and the absolute ownership of the personal property embraced in the trust, during the trust term, and although the trust might have terminated before the expiration of Mrs. Riggs' life by the death of her husband in her lifetime, the suspension was, in legal effect, a suspension during a life. Neither she alone, or in conjunction with the trustees, could abrogate the trust. The statute makes every convey-

ance or other act of the trustees of an express trust in lands, in contravention of the trust, absolutely void, and, by analogy, the same rule governs trusts of personal property. (1 R. S. 730, § 65; *Graff v. Bonnett*, 31 N. Y. 9; *Campbell v. Foster*, 35 Id. 361.) The will further provides, in a contingency, for the suspension of the power of alienation and the absolute ownership of at least one-half of the same property during the lives of the two children of the testatrix, making possible a suspension for three lives, if the trust created by the trust deed and the trust created by the will are to be read as if incorporated in a single instrument, viz., the trust deed of 1853.

If Mrs. Riggs remained the absolute owner of the property after the execution of the trust deed, subject only to the estate of the trustees for her life, the trusts in the will would be valid. The reversion in the case supposed would be property which she could grant or devise, and limit future estates thereon in her discretion, subject only to the restriction that they must vest in absolute ownership within two lives in being at their creation. But Mrs. Riggs was not the absolute owner of an estate in reversion, after the execution of the trust deed. In form the whole estate was conveyed to the trustees. Their title, however, was, in legal effect, limited in point of duration to the trust term. (*Stevenson v. Lesley*, 70 N. Y. 512; *Crooke v. Co. of Kings*, 97 Id. 451.) But the trust deed itself contains a limitation of the estate to other persons than Mrs. Riggs in the event of her death before her husband, and without having made an appointment by will, viz., to such persons living at her death as would take the property as her heirs under the laws of the State of New York by descent, as if it was wholly real estate.

The property transferred by the trust deed was mainly personal, but at the time of Mrs. Riggs' death was mainly real, the trustees having, under the authority of the deed, invested the fund to a large extent in real estate situate in New York and Maryland. The remaindermen, in case the event happened upon which the remainder was limited,

would take as purchasers. It was limited to persons who would not be entitled, as of course, to the personal estate, and who might not be entitled to the real estate outside of New York, and whose title would not be subject to the tenancy by the curtesy of the husband, as it would have been if the deed had not been made. (See *Reading v. Rawsterne*, 2 Ld. Raymond, 826.) It is true that the remainder might be defeated by either of two events; the death of Mrs. Riggs before the death of her husband, or by her will made in execution of the power of appointment and taking effect during his life, and it was in fact defeated in the latter way. But Mrs. Riggs could not during the life of her husband affect the limitation in remainder, except in the particular way pointed out, that is by an appointment by will. She could not defeat it by a conveyance *inter vivos*. The quality of absolute property, which enables an owner to dispose of it in any of the forms known to the law, did not attach to the interest remaining in Mrs. Riggs after the execution of the trust deed. What she did have was a reversion depending on the event of her outliving her husband, which has been defeated by her death, and in addition a right to appoint by will only in case of her death during coverture. It is a doctrine of the common law that an unrestricted power to appoint a fee in lands by deed or will is equivalent to ownership, because the donee of the power may at any time, by exercising the power, acquire an absolute estate, and for this reason the question of perpetuity arising upon limitations made by the donee of such a power is determined with reference to the date of the execution of the power and not of the instrument creating it. (Sugden on Powers, vol. 1, page 469 *et seq.*) But the general rule is expressed by Chancellor Kent in his Commentaries (vol. 4, page 337): "An estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power." The power of disposition reserved by Mrs. Riggs in the trust deed was not an absolute power equivalent to absolute ownership. It was restricted to a disposition by will. The statute of powers

(§ 85) defines an absolute power to be one by which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit. The power in this case, under the definition in our statute, was general, but not absolute. (*Cutting v. Cutting*, 86 N. Y. 535.)

We think the validity of the suspension in the will of Mrs. Riggs is to be determined by the test whether it would be valid if it had been part of the limitation in the trust deed and had been inserted therein at the time the deed was executed. This seems to be the rule of our statute and it is the rule of the common law in respect to appointments under special powers, but not as to appointments under general or absolute powers. Mr. Jarman, in referring to this subject, says that the reason that this test is not applicable to appointments under general powers is that such powers are, in point of alienation equivalent to actual ownership, but he adds: "This reason fails when the power, though general in its objects, is to be exercised by will only. In such a case the power of disposition is suspended during the life of the donee, and appointments made by virtue of it are, therefore, to be tested in the same way as appointments under a special power." (1 Jar. [5th ed.] 291.) The case of *Re Powell's Trusts* (39 L. J. Ch. 188), decided by James, V. C., cited by Mr. Jarman, fully sustains the text. The case of *Rouse v. Jackson* (L. R. 29, Ch. Div. 521), seems to be adverse, but it proceeded, I think, on a failure to discriminate between a general and unrestricted power and one to be exercised by will only, and this is the view taken by Mr. Gray in his work on Perpetuities (§ 526); see, also Marsden on Perpetuities (p. 250). Construing the trusts in the will of Mrs. Riggs as if created at the date of the trust deed of 1853, they are invalid as they provide for a possible suspension of the power of alienation of real estate and the absolute ownership of personal property for three lives, and for the additional reasons that the two children, upon whose lives the trusts in the will are limited, were not in being when the trust deed was executed, and could not have taken such an estate as was lim-

ited under the will, if it had been limited in the same manner in the deed of 1853.

The argument is urged that, conceding that the absolute power of alienation of the trust estate was suspended during the coverture of Mrs. Riggs under the general rule, by reason of the disability imposed by the statute upon the trustees to do any act or make any conveyance in contravention of the trust, this disability was removed as to property held in trust for married women, by the married woman's act of 1848, as amended by the second section of the act of 1849. That section provides that any person who may hold any real or personal property as trustee for any married woman may, on her written request, convey the same to her, or the rents, issues or profits thereof, for her "sole and separate use and benefit," but it is made a condition to such conveyance that the request shall be accompanied by a certificate of a justice of the Supreme Court that "he has examined the condition and situation of the property and made due inquiry into the capacity of the married woman to manage and conduct the same." This statute does not, we think, answer the difficulty. Assuming that the trust in this case was within the statute of 1849, the disability imposed upon a trustee of an express trust by the general statute is not removed in the case of a trustee for a married woman, except conditionally, the condition being the judicial action of a judge certifying, after an examination of the facts, that it is a proper case for the exercise of the power conferred by the act. In substance, the statute confers a power dependent upon the consent of a judge of the court. Until such consent is obtained the suspension continues. It could not be terminated by the conjoint action of the trustees and Mrs. Riggs. The general test of alienability is that there are persons in being who can make a perfect title. This cannot be predicated, we think, of a situation where judicial action, which may or may not be obtained, is requisite to authorize a conveyance. (See Gray on Perpetuities, § 527.) But, independently of this consideration, we think the statute was intended to apply merely to nominal trusts to secure a married woman in the

enjoyment of her separate estate, where this was the sole object of the trust. The statute in such a case permits the trust to be abrogated and the legal title to be vested in the beneficial owner, the separation of the legal and equitable estates no longer serving under our statutes any useful purpose. It certainly cannot be construed to prevent a parent, relative or other person from creating an express trust to apply the rents and profits of the trust estate for the benefit of a married daughter, niece or other female without subjecting it to the risk of destruction by the conjoint action of the trustee, the beneficiary and the court. The trust created by the deed of 1853 was not a mere formal or passive trust. The title to the property was vested in the trustees. It was strictly a trust under the statute. The deed not only declared the interest of Mrs. Riggs in the trust property, but limited thereon future contingent estates to take effect on her death during coverture, unless defeated by her appointment by will. The trust was not, we think, within the purview of the statute of 1849. If a conveyance had been made to her under that statute, the property would not be held "for her sole and separate use and benefit," because the contingent estate in remainder could not in that way be defeated. (*Bryan v. Knickerbacker*, 1 Barb. Ch. 409; *Wright v. Tallmadge*, 15 N. Y. 315.) We think the court below properly construed the will, and the judgment should, therefore, be affirmed.

EARL, FINCH and PECKHAM, JJ., concur; DANFORTH and GRAY, JJ., dissent on the ground that the fee did not pass to the trustees by the deed. They took no greater estate under it than was sufficient for them to perform the duties stated. The remainder, or reversion, remained in the grantor. The will was not in the execution of any power, and there is, therefore, no contravention of the statute against unlawful perpetuities in the trust provisions of the will. RUGER, Ch. J., does not vote.

Judgment affirmed.

See, also, *Cruikshank v. The Home for the Friendless*, next following, and the cross-references.

CRUIKSHANK vs. THE HOME FOR THE FRIENDLESS.

[118 New York, 337.]

CHARITABLE BEQUESTS.—PERPETUITIES.

A bequest to executors, coupled with a direction to them to obtain from the legislature, "as early as practicable," or "before the expiration of ten years after my decease," a charter for a charitable institution to be the recipient of the gift, is invalid, as an unlawful suspension of the power of alienation; the gift contemplated a period, measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed.

Cross appeal from a judgment of the General Term of the Supreme Court in the first judicial department. The clause in dispute was as follows :—

"Eleventhly. Whereas, I am unmarried and have no direct heirs to my estate other than my said two nieces, brother and sisters, for whom I entertain a sincere affection, but who possess ample wealth and whose happiness would not, in my opinion, be increased by their receiving more than I have already given to them, I, therefore, decide to follow the impulses of my own heart, and to make such disposition of the remainder of my property as my sense of duty and desire of usefulness both urge and induce me. Accordingly, I hereby give, devise and bequeath to my executors hereinafter named, all the rest, residue and remainder of my estate, both real and personal, in trust, nevertheless to apply and dispose of the same in the manner and for the purposes hereinafter expressed and set forth. I direct, authorize and require them to apply and employ such estate, both real and personal, or the proceeds arising from the sale of all or any part of the same (which I hereby empower them to make at such time or times as they shall deem expedient or advantageous) to the establishment, support and endowment of a charitable institution to be located in the city of New York, to be styled or named "The Delaplaine Institute for the Relief of the Friendless." My desire is, that the object of the same and

the class of persons to be relieved and benefited thereby should be similar to the object and to the recipients of the charity of the institution in the city of New York, now known as the Home for the Friendless, my wish being to make it similarly useful. I authorize and direct my executors to apply for and obtain from the legislature of the State of New York, as early as practicable, an act of incorporation of the same, and I also fully authorize and empower them to make all such by-laws and ordinances relating to the management and government of the same, and further to do and perform all such acts and deeds as shall, in their judgment and discretion, most promote and effect my benevolent and charitable intentions. It is, moreover, my will and desire that in the event that this bequest and devise of my residuary estate should be adjudged or prove invalid, or its execution be impossible, either by judicial decision or from any other cause, that then all the real and personal estate bequeathed and devised thereunder shall be sold and the proceeds of such sale shall be equally divided and paid over to the nine charitable and religious institutions mentioned in the ninth and tenth clauses of this my will, also the American Bible Society and the American Missionary Association."

By the codicil the testator devised to a sister, who died before the testator, two lots described. It also contained this clause :

"Seventhly. In order to obviate, as far as I may be able, any chance or possibility that the devise to my executors in trust of my residuary estate for the establishment and endowment of an institute for the relief of the friendless be delayed or defeated by reason of any uncertainty or limitation therein expressed, or any legal defect therein, although it is my belief and intention to have effectually guarded against such event by my having invested my said executors with absolute power to do and perform all such acts and deeds as shall, in their judgment and discretion, most promote and effect my intention, I now further recommend and direct my executors to apply for and to obtain, if possi-

ble, the act of incorporation as in my will mentioned before the expiration of ten years after my decease, while I repeat my desire that they endeavor to obtain it as early as practicable; and I further hereby authorize and empower them, if they or their counsel in the law shall deem it to be expedient or requisite, to make an application to the Supreme Court of the State of New York for such order or orders in the matter as shall enable them to perform and carry out my intentions by so amending the form or expression of such devise as far as may be necessary to prevent it from being inconsistent with any law or statute of said State, and in that case I hereby authorize them to perform and execute such order or orders, which, as far as necessary to secure and establish the validity of said devise, I hereby accept and assume as a modification and qualification of said devise as though the same were herein fully expressed."

Further facts are stated in the opinion.

Michael H. Cardozo, for the plaintiff, appellant.

Lucien B. Chase, for Julia A. Chase, appellant.

Joseph A. Welch, for T. W. Chambers, appellant.

C. E. Tracy, *David McClure* and *Austin Abbott*, for the respondents.

FINCH, J. The testator devoted the bulk of his estate to charity. He carefully explained in his will that he left neither wife nor children; that his brother and sisters and nieces were already in comfortable, if not affluent, circumstances; and so he felt at liberty, after some moderate gifts to them, to follow "the impulses of his own heart" and his "sense of duty" by devoting the rest of his property to the rescue and help of the unfortunate. Two of his nieces, Mrs. Schieffelin and Mrs. Beekman, accepted the disposition which he made, but his sister, Mrs. Chase, in her own

right and as administratrix of the deceased brother, seriously disapproves, and is now here upon appeal seeking to wrest the property from the uses of charity, and, to that end, invoking the aid of established rules of law to destroy the trust created by the will, and break through its fences into the fortune which the testator, at least, intended to withhold.

His primary purpose was to found and endow an institution to be denominated the Delaplaine Home for the Friendless. It was to be situated in the city of New York. Its object, as it existed in his mind, was indicated only by its name, and his reference to a similar institution already incorporated and doing its charitable work. He says: "My desire is that the object of the same and the class of persons to be relieved and benefited thereby should be similar to the object and to the recipients of the charity of the institution in the city of New York now known as the Home for the Friendless, my wish being to make it similarly useful." To accomplish his purpose he directs his executors to apply for and obtain from the legislature, as early as practicable, an act of incorporation; and in a codicil to the will recommends and directs that it be obtained before the expiration of ten years from his decease, but repeats the injunction that it be obtained as soon as possible. There seems to have been in his mind some lurking doubt of the validity of his trust, and some fear that collaterals might covet his wealth, and so he provides an alternative or substituted devise and bequest of the same residue to a number of existing charitable corporations, which he names, "in the event," as he phrases it, "that this bequest and devise of my residuary estate should be adjudged or prove invalid, or its execution be impossible, either by judicial decision or from any other cause." The courts below have held that the gift to the corporation to be created is invalid, because it suspends the absolute power of alienation beyond the statutory limit, and from that determination the executors have appealed. Those courts also decided that the substituted bequest to the charitable societies

named was valid, and from that decision Mrs Chase appeals. Two questions are, therefore, presented for our consideration.

First. Can the gift to the unincorporated and non-existing institution be sustained? It is quite apparent that the testator expected and the will contemplated a delay before vesting in the intended beneficiary long enough to enable it to come into being through the consent of the sovereign, and which by possibility might extend to a period of ten years. Such incorporation was dependent upon the will of the legislature. Its consent could reasonably be anticipated, but was not at all certain. Eleven existing corporations, more or less useful and influential, were to take the property if a charter should be withheld, and under their possible pressure and argument the legislature might think that the interest of the State would be better subserved by the strengthening of existing institutions which had passed beyond the stage of experiment than by the creation of a new one, more especially when a Home for the Friendless already existed. It might be argued that under the will a choice of alternatives was fairly left to the State, which it might make by granting or refusing a charter to the proposed institution. The delay contemplated was not incidental merely to a result certain and possible, as in *Robert v. Corning* (89 N. Y. 225), where it was the time reasonably needed for a conversion in the ordinary manner, but contingent upon the uncertain action of the State, which might not take place at all, and leave a period of ten years during which the of power alienation would be suspended. It is not material to consider where the fee would lodge in the interim, whether in the executors, by force of an express or implied trust, or in the heirs by descent, subject to be divested by the happening of the contingency. In either case there was contemplated a period measured by years and not by lives in being during which there would be no persons in existence by whom an absolute estate in possession could be conveyed. The authorities fully and clearly determine the invalidity of such a limitation. In *Bascom v.*

Albertson (34 N. Y. 584), the gift was to such persons in Vermont as might be appointed by the Supreme Court of that State as trustees of an institution to be located at Middlebury for the education of females. Beyond a criticism upon the uncertainty of the object, the court held that the bequest was void because it was contingent and executory and involved an illegal suspension of the ownership of the fund. To a similar effect are *Leonard v. Burr* (18 N. Y. 107), in which the gift was to the village of Gloversville, when it should be incorporated, for a public library; *Dodge v. Pond* (23 Id. 69), where the bequest was for a college to be founded in Liberia; *Beekman v. Bonsor* (23 Id. 306), in which an effort was made to found a dispensary; and *Rose v. Rose* (4 Abb. Court of Appeals Dec. 108). One vice in all these cases was that by force of the limitations created the ownership was left "swinging in abeyance," doubtful of its direction and ultimate resting-place, and this for a period longer or shorter, and not measured by lives in being. Where that limit of suspension was provided the trust escaped condemnation; as in *Shipman v. Rollins* (98 N. Y. 311), where the gift was to vest or fail at the end of the one life of the widow; and in *Burrill v. Boardman* (43 Id. 254), where a hospital was to be incorporated, but within the two lives of a nephew named and the youngest of the executors.

It does not save the gift that in the present case a Home for the Friendless could have been incorporated under the general law, for such a corporation the testator did not intend or direct, but specifically required that his donee should be a corporation formed under a special charter.

The restrictions in the general law made it inappropriate to the testator's design, but, whether so or not, we cannot substitute for his explicit direction something other and different, and outside of his expressed purpose. Nor does it help the situation to say that there was an equitable conversion resulting from the power of sale which, though discretionary, was claimed to be essential to the scope and plan of the will; and that the property treated as personal

was not within the statute regulating trusts, as was held in *Gilman v. McArdle* (99 N. Y. 451). That doctrine does not reach or affect the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives; and a power of sale does not avoid the statute when the resultant proceeds wear the same fetters as restrained the alienation of the land. In *Bascom v. Albertson* (*supra*), the whole residue covered by the bequest was of personal assets in this State; and if, in the present case, the land be deemed money, the fundamental difficulty is not removed. I can discover no permissible escape from the conclusion that the primary devise for a new Home for the Friendless was invalid.

Second. The next question respects the consequences of that conclusion. One would suppose, as the courts below have decided, that the alternative and substituted devises and bequests to the eleven charitable corporations would vest at the death of the testator; but in behalf of Mrs. Chase it is argued that a suspension was contemplated until the final judgment of the court declaring the invalidity of the primary devise. I think we may make short work of that proposition. The judgment of the court does not make or create the invalidity; it declares its existence at the date of the testator's death, and *eo instanti* the alternative devises took effect. The testator's reference to a judicial decision is accompanied by the expression as to his primary devise "if it shall *prove* invalid;" that is, if it shall turn out invalid, or shall be ineffective. His use of the word "then" is in the sense of in that event, and his obvious meaning, which no refinement of criticism can obscure, is that if his devise to the non-existent corporation be void the alternative gifts shall vest. They so vested at his death. Our judgment merely ascertains that fact and settles it, but it existed before our decree, and at the instant of the testator's decease. No question is here raised as to the capacity of the eleven corporations to take.

Third. But a third question, of a minor character as to the amount involved, is presented for our determination.

By the codicil to his will the testator gave to his sister, Emily L. Fuller, two lots of land to be held by her in fee simple. She died in testator's lifetime, and the old rule that while lapsed bequests fall into the residue, lapsed devises do not, but go to the heirs as undisposed of by the will, is invoked to carry the land to the heirs and take it from the charities. I think that rule must be regarded as changed, and that there is now no reason for difference and so no difference between lapsed legacies and lapsed devises as it respects the operation upon them of a general residuary clause. Among the numerous reasons which have been assigned for the common law rule, some of which were always artificial and unsatisfactory, the principal and most sensible one is well stated by Learned, J., in *Hillis v. Hillis* (16 Hun, 76), and by Grover, J., in *Youngs v. Youngs* (45 N. Y. 254). That reason was that the right to dispose of land by will, when regained after its loss, came in the form of a right to dispose of uses, and, since the appointment of uses was a present act, the power to devise was held to apply at the date of the will or of the disposing act, and so the residuary clause would cover neither lapsed devises nor after-acquired lands. This reason wholly disappeared when our statute made the will speak from the testator's death both as to real and personal property. It provides that where a testator, in express terms, devises all his real property or indicates his intent to dispose of it all, the will shall be construed to pass all which he was entitled to devise at the time of his death. (2 R. S. 57, § 5.) As I read the case of *Youngs v. Youngs*, the lapsed devise was carried to the residue upon two grounds: one, that the rule as to lapsed devises had become the same as to lapsed legacies, and, the other, that a contingent remainder framed by the will was wholly undisposed of unless covered by the devise of the residue. The same opinion as to a change in the rule is expressed in *Hillis v. Hillis*, though it was deemed not essential to the result finally reached. The subject came under discussion in the courts of Massachusetts after an enactment similar to our own, and resulted in a conclusion

which put lapsed devises upon a footing identical with lapsed legacies. (*Thayer v. Wellington*, 9 Allen, 283.) I think that must be regarded as the correct rule applicable to a general residuary clause which is not narrowed or restricted by the terms of its own construction. The testator in the present case clearly expressed his intention to pass all his property, and that nothing additional should pass to his heirs beyond what he had effectually given them. He explains his reasons for that; speaks of an intended disposition of "the remainder" of his property; and then formally devises and bequeaths to his executors all the rest, residue and remainder of his estate, both real and personal, in trust. I think we should hold that the lapsed devise fell into the residue. Since, in the event which has happened of the vesting of the residue in the eleven charitable societies, there was an imperative direction for the conversion of the real estate into money and a gift of the proceeds, it follows that the rents and profits go with the residue to the ultimate legatees. (*Lent v. Howard*, 89 N. Y. 169.)

The judgment should be affirmed, with costs to all parties payable out of the estate.

All concur.

Judgment affirmed.

Bequests to non-existing bodies.—As a general rule a devise made to a non-existing body is invalid. *White v. Howard*, 46 N. Y. 144; *Zeiswels v. James*, 68 Pa. St. 465; *Cholmley's Case*, 1 Coke, 564; unless trustees be appointed by the testator to hold the legal title. *Fidelity Insurance Trust Company's Appeal*, 99 Pa. St. 448.

But an exception is made in favor of devises and legacies for charitable purposes: and if the uses be such as a court of equity may enforce and administer, they will not be allowed to fail for want of a trustee, or on account of delay in the passage of the enabling act. *Beach on Wills*, § 128; *Missionary Society v. Chapman*, 128 Mass. 265; *Fellows v. Miner*, 119 Mass. 541; *Baker v. Clarke Inst.* 110 Mass. 88; *Saunderson v. White*, 18 Pick. 328; *Odell v. Odell*, 10 Allen, 1; *McGirr v. Aaron*, 1 Pa. St. 49; *Byers v. McCartney*, 62 Iowa, 339; *Tobin's Estate*, *Myrick's Prob.* 134.

The property in the meanwhile descends to the heir, charged with the trust. *Byers v. McCartney*, 62 Iowa, 339.

Thus, in *Jones v. Habersham*, 107 U. S. 174, a bequest to the first Christian church erected or to be erected in a certain place, or to such persons as might become trustees thereof, was held to be valid. In New York, however, this exception in favor of charitable gifts does not prevail. *Beach on Wills*, § 128; *White v. Howard*, 46 N. Y. 144; *Downing v. Marshall*, 23 N. Y. 366; *Owen v. Missionary Society*, 14 N. Y. 380; *Sherwood v. American Bible Society*, 1 Keyes, 561.

If it appear from the will that the subject of the gift is to come into being at some future time, or upon some future contingency will be qualified to take, it is not presumed that the testator intended to make a present disposition of the property if it be possible to construe the will otherwise. *Tilden v. Green*, 2 N. Y. Supp. 584; s. c. 7 N. Y. Supp. 382; *Beach on Wills*, § 128; *Burrill v. Boardman*, 48 N. Y. 254; *Cory Society v. Beatty*, 28 N. J. Eq. 570.

See, also, *Kent v. Dunham*, 5 Am. Prob. Rep. 14; *Farnam v. Farnam*, Id. 103; *Tappan's Appeal*, Id. 198; *Robert v. Corning*, 8 Id. 178; *Bates v. Bates*, Id. 212; *Piper v. Moulton*, 2 Id. 574, and the note; *Simpson v. Cook*, 1 Id. 27; *Slade v. Patten*, Id. 346; *Genet v. Hunt*, *supra*, 477; *Beach on Wills*, §§ 134, 135, 136, 137, 138, 139.

BISHOP vs. BISHOP.

[56 Connecticut, 208.]

DELEGATION OF THE POWER TO APPOINT AN EXECUTOR.

A testator can exercise his power of appointing an executor through an agent after his death.

SUIT for the construction of a will. The opinion states the case.

W. D. Bishop, Jr., for all the parties in interest.

PARDEE, J. On January 25th, 1868, Mary Bishop executed her will, disposing of a large estate, and appointing her two sons, Ethan F. and William D. Bishop, executors. She died September 14th, 1880. On the 25th day of that

month Ethan F., by written notice to the Probate Court, declined to accept the executorship. On the 27th day of the same month the will was admitted to probate and letters testamentary issued to William D. Bishop, the plaintiff, as sole executor, who duly qualified and entered upon the discharge of his duties. E. F. Bishop died on December 8th, 1883. The plaintiff having until the present time been sole executor, now desires the appointment of a co-executor. The will contains the following provision :—"I do hereby constitute and appoint my two sons, Ethan F. Bishop and William D. Bishop, executors of this my last will and testament ; and in the event of the death or resignation of either of my said executors, I do hereby direct that his successor in said trust shall be appointed jointly by the judge of probate of the district of Bridgeport and by the surviving executor, and that all subsequent vacancies in said executorship shall be filled in like manner."

The plaintiff asks the Superior Court if, upon the foregoing facts and the cited provision from the will, the judge of probate and himself can now appoint a co-executor. That court has reserved the question for our advice.

As a matter of certainty the testatrix made it possible that there might be two executors of her will ; as a matter of probability, amounting almost to certainty, she both expected and desired that two should continue to execute it. For she confers upon two persons jointly authority to speak for her in the unlimited future in the matter of filling a vacancy.

All this justifies us in including within her intention the vacancy caused by the declination of either of her appointees to qualify and discharge the duties, as well as that caused by resignation after qualification. Presumably, her mind was upon the matter of substance, namely, the continued succession of two, rather than upon an unimportant question, namely, what caused a vacancy ? And as the two causes, death and resignation, produce the vast majority of vacancies, it may safely be assumed that in using them she

intended to cover every vacancy in the execution of her will.

Moreover, by her appointment the testatrix conferred upon Ethan F. Bishop the right to the office of executor if he should choose to accept, qualify and discharge the duties. Acceptance, qualification and discharge of duties depended upon himself solely ; no one could prevent him. To decline to accept, qualify and discharge the duties is, as a matter of substance, no less a resignation than if he had accepted and qualified and had then notified the judge of probate that he had resigned and would not discharge the duties. In either case it is precisely the same right which he lays down, namely, the right to exercise the office.

The executor is the creation solely of the testator. And it is within the power of the latter, not only to appoint personally, but he may project his power of appointment into the future, and exercise it after death through an agent selected by him. And the agent may be pointed out by name, or by his office or other method of certain identification. (*Hartnett v. Wandell*, 60 N. York, 346 ; *State v. Rogers*, 1 Houst. [Del.] 569 ; *Jackson v. Paulet*, 2 Robert, 344 ; *In Goods of Cringan*, 1 Hagg. 548 ; *In Goods of Deichman*, 3 Curteis, 123.) Therefore the Superior Court is advised that since the death of this testatrix she can lawfully continue to fill vacancies in the executorship of her will by the joint appointment of her duly authorised representatives, the plaintiff and the person who for the time being holds the office of judge of probate for the district of Bridgeport.

In this opinion the other judges concurred.

LAWRENCE vs. THE SECURITY COMPANY,

[56 Connecticut, 423.]

BEQUEST OF RESIDUE.—INCOME.—HOW COMPUTED.

Where there is a bequest of the whole or of an aliquot part of the residue of an estate to a legatee for life, with remainder over, and no time is fixed by the will for the commencement of the life estate, the legatee is entitled to the income from the residue, as the same may be ascertained, to be computed from the death of the testator.

SCIRE FACIAS upon a process of foreign attachment. The opinion states the case.

E. S. White and *H. R. Mills*, for the appellant.

G. G. Still, for the appellee.

PARDEE, J. Frederick Tyler died on August 3d, 1880. By his will he devised two-fifths of the residue of his estate, after payment of debts and specific legacies, in trust for the life use of his daughter, Mrs. Sarah S. Cowen, the remainder over. The trustees named by him declined the trust. On December 4th, 1880, the defendant, the Security Company, became, and still continues to be, the duly appointed trustee.

On October 29th, 1881, the executors exhibited an account to the Probate Court. It was accepted, and distributors were appointed. On January 23d, 1882, the executors exhibited their final account, and it was accepted. On February 2d, 1882, the distributors made return of distribution, which was accepted. They distributed to the defendant as trustee for Mrs. Cowen real and personal estate of the value of nearly \$40,000.

On June 15th, 1881, the executors paid to the defendant as such trustee the sum of \$15,000, and on August 20th, 1881, the additional sum of \$10,000. Between these respective dates and the first day of November, 1881, these sums earned in the hands of the defendant the sum of

\$431.34 as interest; and it subsequently delivered this last named sum to the executors, as being the property of the estate, on the ground that Mrs. Cowen was not entitled to any interest earned prior to distribution.

On the 24th day of May, 1884, the firm of Brewster & Company, as surviving partner of which the plaintiff brings the present suit of *scire facias*, instituted a civil action against Mrs. Cowen in the Superior Court for Hartford County, demanding \$3,000 damages, and on the 29th day of that month caused due service of garnishment to be made upon the defendant as her agent, trustee and debtor.

On March 15th, 1887, they recovered judgment against her for \$2,135.76 damages, and \$75.17 costs; and on the same day instituted an action on the judgment against her, making due service of process of garnishment thereon upon the defendant as her agent, trustee and debtor. In both cases the officer serving the process called on the defendant, under Gen. Statutes, § 1234, to disclose as to whether it was indebted to Mrs. Cowen, and the defendant replied that it was not then indebted to her.

The officer not being able to find upon the latter process any property belonging to Mrs. Cowen, the firm on the same day filed their petition in the Probate Court, alleging the proceedings in that suit, and asking for the appointment of a trustee to take possession of her estate for the benefit of her creditors.

The suit was pending in the Superior Court at, and was abated by, her death on June 24th, 1887. At the time of the commencement of this second suit Brewster & Company had no reason for believing the disclosure of the defendant to be untrue, and did believe it to be true and relied upon it, and their chief object in instituting the second suit was to make it the basis for proceedings in insolvency, and they did not until some time in April, 1887, know that no part of the income accruing from the estate between the date of the testator's death in August, 1880, and the first day of November, 1881, had been paid to Mrs. Cowen, or that any part of such income had been included in the

amount distributed and paid over to the defendant as trustee.

The Probate Court allowed to Mrs. Cowen, and she accepted, the sum of \$1,500 for her support during the settlement of the estate as the family of the testator.

On February 2d, 1882, the distributors made their return of distribution, which was accepted by the Probate Court. After deducting specific legacies, family allowances, debts and all other charges, the residue left for distribution amounted to \$99,425.51, which amount included the estate inventoried, increase in value of stocks, proceeds of sales, and all interest, rents and dividends, amounting to \$5,110.21, accruing from the death of the testator to November, 1881; and in payment of debts and charges, and in the distribution, no distinction was made between principal and income. The defendant as such trustee received two-fifths of the residue so made up and treated the whole as the principal of the trust fund.

The executors did not pay to Mrs. Cowen any part of the interest, rents or dividends accruing before November 1st, 1881, unless the allowance of \$1,500 to her as the family of the testator can legally be so treated.

Neither Mrs. Cowen, nor the defendant, nor any person in her behalf, objected to the distribution or appealed from the decree of the Probate Court accepting it.

In February, 1883, and on each subsequent January to the present year, the defendant as such trustee has exhibited an account to the Probate Court, of receipts, payments and expenses as trustee, and an inventory of the trust fund, making oath that the accounts were correct; the Probate Court indorsed thereon "exhibited, sworn to and accepted," with the date, and recorded the same, together with such indorsement; with this exception, that the part of the account giving items was not recorded, but filed merely. Mrs. Cowen was not present at such exhibition of accounts; she had neither notice nor knowledge thereof, and she took no appeal from the decree of the court accepting it.

Upon the death of Mrs. Cowen intestate, her estate was

represented as insolvent, and commissioners were appointed to receive and determine upon claims presented against it. Subsequently to the bringing of this suit the plaintiff presented his judgment to them as a claim, omitting to state that he had any security therefor, as required by Gen. Statutes, § 590, and the commissioners allowed the same in full as a claim wholly unsecured.

Upon the foregoing facts the plaintiff claimed: (1st.) That by the will of Frederick Tyler, Mrs. Cowen was entitled to rent and income accruing after the date of the testator's death (instead of after November 1st, 1881) from the estate given by the fourth clause of the will in trust for her benefit. (2d.) That, if she were not entitled to such rent and income from the date of the death of said Tyler, she was entitled to rent and income so accruing after the expiration of one year, that is, rent and income accruing after August 3d, 1881. (3d.) That she was entitled to the interest, amounting to \$431.34, accruing from June 15th, 1881, and August 20th, 1881, to November 1st, 1881, on the \$15,000 and \$10,000, paid to the trustee by the executors, which interest was paid by the trustee to the executors, instead of to Mrs. Cowen. (4th.) That the defendant had never in fact been released or discharged by Mrs. Cowen from its liability to her for any of said rent or income accruing prior to November 1st, 1881, and that the matters alleged in the answer and found true by the court did not amount to a discharge of such liability by operation of law. (5th.) That, on May 29th, 1884, when the defendant was garnished, it had in its hands, of such rent and income as had accrued between Mr. Tyler's death and November 1st, 1881, a large sum, to wit, about the sum of \$2,000 (namely, two-fifths of \$5,110.21), and that the defendant was liable to Mrs. Cowen and indebted to her on said May 29th, for two-thirds thereof, the other one-third being due to her daughter, Sophia T. (6th.) That the defendant was then liable to Mrs. Cowen for such amount of rent and income, as having moneys belonging to her in its hands which it had received from the executors of Mr. Tyler. (7th.) That

it was then liable to her for such amount, as having in its hands that amount of accrued rents and income belonging to her, which it was its duty as trustee to pay over. (8th.) That it was then liable to her to that amount in damages for its failure to duly execute the trust in her favor, and its neglect to collect and pay over to her the rent and income accruing prior to November 1st, 1881, to which she was entitled. (9th.) That the defendant was liable to Mrs. Cowen and indebted to her at the time of the garnishment on May 29th, 1884, for her portion of rent and income accruing after the expiration of one year from her father's death and prior to November 1st, 1881, that is, from August, 1881, to November 1st, 1881. (10th.) That on May 29th, 1884, the defendant was indebted to Mrs. Cowen for the interest, \$431.34, accruing on said sums of \$15,000 and \$10,000, from June 15th, 1881, and August 20th, 1881, to November 1st, 1881. (11th.) That the plaintiff, by the suit and garnishment of the defendant on March 15th, 1887, had not in any way released or discharged the defendant from its liability upon the original garnishment of May 29th, 1884.

But the court overruled all the claims of the plaintiff, and upon the foregoing facts decided that, under the provisions of section fourth of the will, Mrs. Cowen was not entitled to any rent or income accruing before November 1st, 1881, and also found upon the foregoing facts, that at the time of the garnishment, on May 29th, 1884, the defendant was not indebted to Mrs. Cowen, and had no estate of hers in its hands, and rendered judgment for the defendant. The plaintiff has brought the case before this court by appeal.

The claims of the defendant are: (1st.) That under the will no part of the interest, rents or dividends earned by the estate between the date of the testator's death and the date of distribution became the absolute property of Mrs. Cowen as the life tenant of an aliquot part of the residue of the estate. (2d.) That the bringing of the second suit on March 15th, 1887, and service of process of garnishment

therewith upon the defendant, was the intentional relinquishment of the attachment lien obtained by service of process on May 29th, 1884. (3d.) That there was a distribution by order of the Probate Court, and a payment to the defendant as trustee, of a sum as principal; that this order was conclusive upon the trustee, Mrs. Cowen, and the remaindermen; that neither the trustee nor Mrs. Cowen appealed therefrom; and that the remaindermen, who are interested in the fund, are not parties to this proceeding. (4th.) That the decrees of the Probate Court in allowing the annual accounts of the trustee are conclusive upon all parties, there having been no appeal. (5th.) That the plaintiff by presenting his judgment to the commissioners upon the estate of Mrs. Cowen as being wholly unsecured, waived his lien by garnishment, and is now estopped from claiming anything by virtue thereof.

Whatever may be the rule as to the time when a legacy of a sum of money becomes payable and begins to draw interest if payment is deferred, in the absence of any express declaration upon that point in the will, it is well established that where there is the bequest of the whole or of an aliquot part of the residue of an estate to a legatee for life, remainder over, and no time is fixed by the will for the commencement of such life use, the legatee is entitled to the use or income of the clear residue so bequeathed, as the same may be at last ascertained, to be computed from the death of the testator; is entitled to the income which may accrue during every moment of life subsequent to the moment when the will becomes an operative instrument, unless it places some limitation upon such enjoyment. In the will before us there is no such limitation, either express or by necessary legal implication. (1 Jarman on Wills [4th Am. ed.], side page 547, note; *Williamson v. Williamson*, 6 Paige, 298; *Cooke v. Meeker*, 36 N. York 15; *Bartlett v. Slater*, 53 Conn. 106; *Lovering v. Minot*, 9 Cush. 151; *Pollock v. Learned*, 102 Mass. 54; *Angerstein v. Martin*, Turn. & Russ. 234.)

Between the date of the death of the testator and that of distribution, the estate in the hands of the executors

earned nearly \$4,600. They were the lawful recipients of this income, but it formed no part of the estate to be distributed; no part of the residue of capital which the will required them to pay to the trustee for Mrs. Cowen. It was their duty to pay two-fifths thereof to her as of her absolute property. But they mingled it with the capital and subjected the whole to the action of distributors. These last distributed the whole as the property of the estate; the Probate Court set its seal of approval to the distribution by its decree affirming it. All legatees, life tenants and remaindermen alike, including Mrs. Cowen, were parties to this decree determining that this income should be distributed as principal. Mrs. Cowen was of legal capacity; she knew that the estate was in settlement in the Probate Court and that that court would by its decree determine her right in this regard; she had her day in court and the right of appeal; this last right none the less because her share of the residue would be in the keeping of the defendant as trustee. Inasmuch, therefore, as the defendant had neither possession nor right of possession of this portion of the rents, interest and dividends belonging to Mrs. Cowen, nor owed any legal duty to her either to obtain such possession or to appeal on her behalf from the decree of approval by the Probate Court of the distribution thereof, it had not in respect thereof at the time of service of the plaintiff's process of garnishment, any money, goods or effects belonging to her in its hands, and owed her no debt.

The legal duty owed by it to her could be discharged by the safe keeping of the amount which it received under the decree of the Probate Court as residuary principal of the estate. There is, therefore, a final decree of a court having jurisdiction of the property and of all persons interested in it, neither reversed nor appealed from, determining that a portion of the property which the plaintiff seeks by his writ of *scire facias* to sequester to his use, as the absolute property of Mrs. Cowen, is not such. The rights of remaindermen under that decree are beyond his reach.

On the 15th day of June, 1881, the executors paid, as a

portion of the residue, \$15,000, and on August 20th following \$10,000, to the defendant as such trustee, as principal of the fund for the life use of Mrs. Cowen. These sums so received and retained by it earned in its hands the sum of \$431.34 prior to the first day of November following. This interest thus received was the absolute property of Mrs. Cowen. Upon reception thereof the defendant became her debtor to that amount, and could relieve itself from its obligation to her therefor only by payment to or for her. The payment thereof by it to the executors was neither to nor for her; therefore, so far as she was concerned, it was of no legal significance. As to her it was a wrongful payment. The defendant continued thereafter to be her debtor as before, and that debt is subject to attachment by the plaintiff. This result is not affected by the fact that this income was subsequently mingled by the executors with the principal of the estate, and was distributed as such under the order of the Probate Court, and that such distribution was confirmed by a decree of the court to which Mrs. Cowen was a party and from which she took no appeal. That decree concludes her as between herself and the remaindermen, but not as between herself and the defendant as her trustee, in respect to its obligations to her. The sole purpose of it was to determine that the distributors had rightly divided the residue; not at all to adjust an account between trustee and *cestui que trust*. Nor is it affected by the fact that the Probate Court subsequently approved a statement of that account in which such payment was entered. This was no notice to her that such payment had been made; none that approval thereof would be asked. She had no knowledge either of payment or of approval. No statute required, indeed no statute could require her to take notice of either at her peril. The order passed under such circumstances does not conclude her.

While the estate was before the Probate Court for settlement that court had jurisdiction of it for all purposes until the settlement was completed; but when a portion of the residue was distributed to the defendant as trustee, the

trust fund became a distinct matter, over which the Probate Court had no jurisdiction until it was brought before it, and it could not be brought before it in such a way as to give it complete jurisdiction so that it could pass a decree binding upon all parties interested, except by notice served upon those parties. The filing of an inventory by the trustee and the rendering of an annual account, under Gen. Statutes, § 498, does not give the court such jurisdiction where such notice has not been given.

Upon the death of Mrs. Cowen intestate, her estate was represented to be insolvent, and commissioners were appointed to receive and decide upon the claims of creditors, and to report to the Probate Court a list thereof, specifying such as were allowed, also such as were disallowed by them, and to inquire into the cash value of any security upon the property of the estate which any creditor might have. The plaintiff presented his judgment as a claim to the commissioners, making no mention of any security by attachment, and his judgment was allowed in full, as an unsecured claim.

It is the claim of the defendant that thereby the plaintiff waived his lien and estopped himself from now claiming anything under it.

The commissioners reported to the Probate Court their allowance of the entire amount of the plaintiff's judgment as a claim in his favor against the estate of Mrs. Cowen, and were silent as to any security therefor. That report not having been appealed from, the defendant, whether speaking for itself or Mrs. Cowen's estate, cannot now inquire as to the amount thereby ordered to be paid to the plaintiff. The matter was one wholly for the commissioners to determine, or the Superior Court on appeal from their action, and the plaintiff's right to any security that he held and is now claiming, is not affected by his action at that time or by that of the commissioners. The estate has had its day in court, and it cannot now intervene between the parties to the present suit. Much less can the defendant,

holding money of the estate, make the matter a defense to this *scire facias*.

The defendant thinks that a great wrong will be done if the plaintiff should by the joint effect of the allowance by the commissioners and of his lien receive a larger per centage upon his claim than he would regularly have done. The wrong would be greater if an insolvent debtor should be allowed to withhold a portion of his estate from all creditors ; and still greater if this defendant, not a creditor, should be allowed to keep a portion for its own use.

The plaintiff by his first writ, served on the 29th day of May, 1884, attached whatever of the property of Mrs. Cowen was then in the hands of the defendant. By his second writ, served on the 15th day of March, 1887, and which was an action on the judgment obtained in the first suit, he again garnished the defendant, attaching thereby whatever of such property had come into its hands between these respective dates. The defendant insists that the second suit is the intentional abandonment of the first.

The question of intent is one of fact, and there is no finding of abandonment. Besides this, it is found that the second suit was brought as a step under the statute toward carrying Mrs. Cowen into insolvency. With this object in view, there is no room for the inference that he intended in bringing it to abandon the lien that he had acquired by the first attachment. As the second suit never went into judgment it is not necessary to consider what would have been the effect on the *scire facias* if the first judgment had been merged in a second one.

The Probate Court made an allowance to Mrs. Cowen from the estate of her father, of the sum of \$1,500 for her subsistence as his family during the period of settlement. This was a discretionary act, having no reference to or effect upon any provision of the will, nor upon the right of any heir or legatee. It was a matter wholly for the Probate Court to determine, and its action cannot be reviewed by this court except upon appeal. Mrs. Cowen's right to the income of the share of residue set apart for her use cannot

be affected by her having received this allowance for her support, although her right to that income may have made the allowance unnecessary.

There is error in the judgment of the Superior Court so far forth as the item of \$431.34 is concerned, being interest accruing upon the sum of \$15,000 between June 15th and November 1st, 1881, and upon the sum of \$10,000 between August 20th and November 1st, 1881, in the hands of the defendant as trustee, for which it was indebted to Mrs. Cowen at the time of service of process of garnishment.

In this opinion the other judges concurred.

From what time a will is construed to "speak."—It may be said, generally speaking, that a will speaks from the time of the testator's death and not from the date of the instrument. Beach on Wills, § 83; Canfield v. Bostwick, 21 Conn. 550, 553. Thus an immediate gift to a class includes the members thereof at the testator's death, Benson v. Wright, 4 Md. Ch. 278; Minott v. Tappan, 123 Mass. 535, unless a contrary intention appear in the will. Clarke's Estate, 82 Pa. St. 528; Buzby's Appeal, 61 Pa. St. 111; Abbott v. Bradstreet, 8 Allen, 537; Morse v. Mason, 11 Allen, 86.

The time at which the persons composing a class are to be determined is regulated by statute in many of our States. A general and detailed consideration of these enactments is given by Mr. Stimson in his compendium of American Statutory Law. § 2806 *et seq.* And in the same work the statutes relating to the disposition of after-acquired realty, whereby the artificial rule of the common law has been abrogated, are fully and clearly collated. §§ 2806 and 2809. It would seem that Florida is the only State in which the will is still construed as speaking from the time of its execution with respect to general devises of realty. 1 Bigelow's Jarman, 350, n.; citing Bush's Fla. Dig. ch. 4, p. 75.

And under our modern statutes, both English and American, contrary to the common law rule, a specific bequest, whether of realty or personalty, is construed to refer to the property answering the description at the time of the testator's death; Struthers v. Struthers, 5 Week. Rep. 809; Miles v. Miles, L. R. 1 Eq. 462; Goodlad v. Burnet, 1 Kay & J. 341; Strevens v. Bayley, 8 Irish L. R. N. S. 410; except where the reference is to a thing incapable of increase or diminution, in which case the bequest is held to speak from the time it was made, Emus v. Smith, 2 De Gex. & S. 722; In

re Gibson, L. R. 2 Eq. 669, as, for example, a legacy of a debt of a designated amount. *Sidney v. Sidney*, L. R. 17 Eq. 65; *Beach on Wills*, § 86.

But in *Thorndike v. Reynolds*, 23 Gratt. 21, a power conferred upon the testator's wife to dispose by will of lands devised to her by her husband, was held to take effect from the execution of the will of the latter.

So descriptions of persons are held to apply to those answering the description at the time the will was made. *Anshutz v. Miller*, 81 Pa. St. 212; *Foster v. Cook*, 3 Bro. C. C. 346; *Beach on Wills*, § 88, and cases there cited.

And if the testator employ words denoting present time, such as, the house "where I now reside," the estate "whereof I am now seized," descendants "now living," they will be held to refer to the date of the will. *Ross v. Ross*, 12 Ben. Mon. 437; *Cole v. Scott*, 16 Sim. 259; *Crossley v. Clare*, Amb. 897; *Attorney-General v. Berry*, 1 Eq. Cas. Abr. 210, pl. 12; *Beach on Wills*, § 87, and cases there cited.

See, also, *Weld v. Putnam*, 1 Am. Prob. Rep. 202; *Ayer v. Ayer*, Id. 604; *Welsh v. Brown*, 2 Id. 221, and the note; *Townsend's Appeal*, 4 Id. 432; *Bartlett v. Slater*, 5 Id. 130; *Vermont State Baptist Convention v. Ladd*, Id. 205; *In the matter of Kernochan*, Id. 260, and the note.

THORN vs. GARNER.

[113 New York, 198.]

INTEREST UPON A LEGACY PAYABLE A FIXED TIME AFTER THE TESTATOR'S DEATH.

Upon a legacy of money made payable by the will within eighteen months after the testator's death, no interest accrues before the time fixed for its payment; and where the executor made certain payments on account of the legacy, during the eighteen months, no interest was properly chargeable.

CROSS appeals from a judgment of the General Term of the Supreme Court in the first judicial department.

Homer A. Nelson, for the plaintiff.

Joseph H. Choate, *Duncan Smith*, *J. Evarts Tracy*, and
William V. Rowe, for the defendants.

Nathaniel S. Smith, for certain infant defendants.

PECKHAM, J. On the 16th of October, 1867, Thomas Garner, a resident of the city of New York, died. Up to the time of his death he had carried on an extensive business in the manufacture and sale of cotton goods under the firm name of Garner & Co. By his will he gave and bequeathed to his son Thomas, plaintiff's testator, the sum of \$1,000,000, to be paid to him within eighteen months after the testator's decease. The chief question arising upon this appeal is, whether the legacy bore interest from the time of the death of the testator up to the time when it was paid, eighteen months thereafter. It has thus far been held that it did. We have come to a contrary conclusion. The statute prohibits the payment of legacies until a year after the granting of letters testamentary; and the general principle is that interest upon legacies is not payable until the principal becomes due. If interest be allowed before that time, without a specific direction in the will, it constitutes an exception to the rule, and is founded generally upon certain facts which the courts have agreed are equivalent to an express direction in the will to pay interest, because, from such facts, the courts will presume an intention on the part of the testator to have it paid. (*Bradner v. Faulkner*, 12 N. Y. 472; *Cooke v. Meeker*, 36 Id. 18; *Brown v. Knapp*, 79 Id. 136.) The fact that the legacy was payable to an infant child, or to an infant towards whom the testator had stood in *loco parentis*, such as a grandchild, and that there was no other provision made in the will for the maintenance of such legatee, has been regarded by the courts as a fact sufficiently indicative of the intention of the testator to authorize payment of interest from his death, although such direction was not found in the will. (Cases cited *supra*.) The widow and daughter of the deceased legatee in this case claimed that there were facts existing which showed that it was the intention of the testator that the legacy should draw interest from the time of his death. It cannot be disputed that if such were his intention, it is the duty of the court to carry it out. As there was no specific direction in his will to pay interest, the claim that, nevertheless, it was the

intention of the testator that it should be paid from the time of his death, is founded upon the statement that the legatee, although at the time of the death of the testator a man twenty-seven or twenty-eight years old, was yet in poor health, unable to support himself, and that from his birth up to the time of the death of the testator, he had been wholly supported by such testator, and that the legacy was, of course, given to him for his support and maintenance, and on account of these facts it was intended by the testator to bear interest from the time of his death; that it could not have been his intention that his son, the legatee, should have no fund to resort to for his support for eighteen months after his death. The learned counsel for the widow and child of the legatee admitted, and very properly, that the mere fact that a legacy is given for the support, in express terms, of an adult child, it is not sufficient to rebut the presumption which exists against an adult that he is able to support himself for the first year, and that, therefore, the support referred to in the particular case must be what is ordinarily understood as support after the first year in accordance with the usual practice. But he claims that the rule is altered when the additional fact is found that on account of the ill health of the legatee, in this case, he was unable to support himself during that year, and that he had no other means of support than the legacy given him by the will of his father. We have looked at all the cases cited by the counsel upon this question, and we find none where it is held that interest upon a legacy is payable from the death of the testator where the legacy was given to an adult. In *McWilliams v. Falcon* (6 Jones' [N. C.] Eq. 235), the interest was directed to be paid annually for the sole and separate use of the testator's mother, and the legacy was demonstrative and the fund productive. In *Hart v. Williams* (77 N. C. 426), the legatee was a freedman. The legacy was a pecuniary one, and, so far as I can understand from the case, interest was allowed commencing a year from the death of the testator. In *Morgan v. Pope* (7 Coldw. [Tenn.] 541), interest, in fact, was allowed commenc-

ing a year from the testator's death. We think there is not enough in this case to show that the intention of the testator (which, as all agree, is a controlling element) was that interest, from the time of his death, should be paid upon this legacy. The legatee, although in delicate health, was not, as the case shows, absolutely incompetent to transact any business.

He was a gentleman of leisure ; traveled considerably ; bought land and built or repaired a house, and clearly was able to be out and to give some little attention to business for at least a portion of the time, had he so desired. It is true his father had always supported him ; but it is equally true that his father knew the condition of his son's health, his capacity for business and his general ability to transact it, and, with such knowledge, made him one of the executors of his estate. The testator was a man of experience, engaged in large business enterprises and a man who had made an immense fortune, stated in the case to have been at the time of his death, between four and five millions of dollars. From the time his son became of age he had given him a salary, nominal in amount, and allowed him to draw for sums far in excess of the amount of his salary. These were charged upon the books of the testator as against the salary account, and the balance charged to profit and loss. To such a man the question of interest was, necessarily, an important one. It was, of course, present to his mind, and it cannot be supposed that if he had intended interest should be paid from the time of his decease, his will would have been silent upon that subject. The language of Gardiner, Ch. J., in *Bradner v. Faulkner* (*supra*), upon the same subject, is very apt here. "In addition to these considerations we have the strong negative evidence of the intention of the testator in his omission to provide that this legacy should draw interest from any period. He was aware that there was to be an interval between his death and the receipt of this bequest by the beneficiary, should his executors comply literally with his injunctions. The amount (of the legacy) was large, and the interest, even for a few

months, too considerable to escape the attention of a man in the habit of making investments and realizing interest upon them, as the inventory of his estate proves to have been the case with the testator. That he, as a man of business, should make no provision for interest, under these circumstances, is presumptive evidence that, in his own opinion, the advantages of his daughter in the disposition of his property, could be, and were equalized without it." . . .

. It is enough that the matter (of the payment of interest) is left in doubt. Plaintiff can rely on the general rule that no interest accrues until the legacy was payable. The burden is upon those who claim it, to show a clear intent that interest should be paid from the time of the death of the testator, notwithstanding his silence on the subject. This has not been done. We are not authorized to speculate as to his intention, or to add to the will by mere conjecture." Before the death of his father, so far as appears from the evidence, the legatee had never drawn as much as \$15,000 a year ; but by his appointment as one of the executors of this estate he had but to qualify, or, in other words, to do what his father by such appointment desired that he should do, and his fees as executor would have been largely in excess of any sum he had annually drawn from his father while living. It may very well be that the testator appointed him executor for the very purpose of enabling him to earn such fees and to place him, in some degree, upon an equality (in the management of the estate, at least) with his younger brother William T. ; and, in addition, the fact that he was executor would enable him to pay himself the amount of the legacy bequeathed to him at the earliest possible moment consistent with the proper administration of the estate. If it were admitted that the rule had been correctly stated by the counsel for the widow of the legatee, we yet hold that this case does not fall within the most liberal construction of that rule, because it is evident from the facts that the legatee had but to qualify as executor of the will of his deceased father to put himself in a position to earn, with very slight effort, far more in the course of a year than

he had ever received from his father while living in the same length of time, and also because by virtue of his position as executor he could have paid the legacy to himself, as above stated. These facts, together with the absence of any direction in the will to pay interest, seem to us to be conclusive against any such intention having existed in the mind of the testator when he executed the will.

What has already been said disposes of the claim made by the counsel for the widow of the legatee, that in any event interest upon the legacy is payable at the expiration of the year from the death of the testator. By the terms of the will it was not due until eighteen months from the time of the testator's death, and the cases cited by the learned counsel, in relation to interest being payable at the expiration of the year, do not apply. The interest charged against plaintiff upon the legacy for eighteen months, and the interest on that sum, must, therefore, be stricken from the account.

The next question arising is whether the interest amounting to \$13,198.95 upon certain alleged advances of Garner & Co. to the legatee is properly charged? We think plainly not. By the system of bookkeeping adopted, it appeared that during the eighteen months which elapsed between the death of Thomas Garner, Sr., and the payment of the legacy of \$1,000,000, certain sums of money, amounting to one hundred and sixty-four thousand and some odd dollars, were paid to the legatee by Garner & Co., and interest upon those payments was charged from the time of each payment until the repayment by the plaintiff after the receipt of the million dollar's legacy. In truth, there were no such advances and no such interest. The whole thing was a mere matter of bookkeeping. Garner & Co. consisted simply of William T. Garner, the brother of the deceased legatee and the executor of his father's will, and the payments made to the legatee, nominally by Garner & Co., were payments on account of the legacy to such legatee by William T. Garner, the executor, and during that eighteen months they amounted to the sum above mentioned. At the expi-

ration of the eighteen months the balance of the million dollars became due and was credited on the books to the legatee as a payment in full of that amount, deducting therefrom the internal revenue tax. The payments actually made being made in truth by William T. Garner on account of the legacy, no interest on those alleged advances by Garner & Co., which was simply another name for William T. Garner, could properly be charged ; and that sum should be deducted from such alleged payments.*

* * * * *

The decree of the court below should be modified in conformity with the views expressed here, and as modified affirmed, with costs to all the parties payable out of the fund.

All concur.

Judgment accordingly.

See, also, *Whitworth v. Ewing*, 5 Am. Prob. Rep. 469, and the note, and the cross-references.

GOODSELL'S APPEAL.

[55 Connecticut, 171.]

REVOCATION BY MARRIAGE AND BIRTH OF A CHILD.—EFFECT OF A STATUTE.

A statute providing for the revocation of a will by subsequent marriage and birth of issue is prospective only. It does not operate upon a will made previously, where the marriage or birth had occurred at the time of the passage of the act, although the testator died afterwards.

* The omitted portion of the opinion treats of small items in the account and presents nothing of general interest.

APPEAL from a decree of a court of probate allowing the will. The facts are stated in the opinion.

J. H. Perry, for the appellant.

G. P. Carroll, for the heir.

R. E. DeForest and *F. L. Rodgers*, for the appellees.

PARDEE, J. John Goodsell made his will in January, 1871, disposing of real and personal estate. He was married in the following May; he died in 1886; his wife survives; no child was born to them. A brother and a nephew are next of kin. He left the will executed in 1871; it made no mention of his wife; she was not known to him when it was executed. The Court of Probate approved the will and admitted it to probate. The widow, Sarah H. Goodsell, appealed. The Superior Court dismissed the appeal and affirmed the decree of the Probate Court. The widow and a nephew of the testator join in an appeal to this court. The reasons assigned are these:

1. That the court did not hold that the statements and acts of the testator as set forth in the finding amounted to a revocation of the will, at least in so far as it disposed of personal estate.

2. That the court did not hold that the will was revoked by section 135, chapter 110, of the Acts of 1885, nor by chapter 84, of the Acts of 1875.

3. That the court did not hold that the will was revoked by the subsequent marriage of the testator, at least in so far as it disposed of personal estate.

4. That the court excluded the evidence offered by her in relation to her pecuniary condition as stated in the finding.

By the common law, marriage and the birth of a child revoked a will. Because of the strong affection of a father for his child and the presumed absolute dependence of the latter upon the former for the necessities of life, whenever

a man marries and a child is born to him and he dies, having made no change in a will executed previous to marriage, which contains no provision in behalf of such child, the law assumes that it does not speak his mind; that the will if made under the altered circumstances would have been different; and sets it aside. Marriage without the birth of a child does not support such assumption, for the wife can protect herself by ante-nuptial contract and has dower.

In 1 Redfield on Wills, 298 (4th ed.), it is said: "The question was very elaborately reviewed at an early day by the most eminent of the American chancellors, and the conclusion reached upon a thorough examination of the cases from the days of Cicero forward, that the subsequent marriage and birth of a child are an implied revocation of a will, either of real or personal estate; but such presumptive revocation may be rebutted by circumstances. It seems that a subsequent marriage or birth of a child alone will not amount to a revocation; both must concur. (*Brush v. Wilkins*, 4 Johns. Ch. 506.) The same conclusion was reached by Shaw, C. J., after a careful examination of the authorities in a case in Massachusetts. (*Warner v. Beach*, 4 Gray, 162; 1 Jarman on Wills, 272, 5th Am. ed., with notes by Randolph & Talcott; *Card v. Alexander*, 48 Conn. 504.)

Cases in Illinois and North Carolina have been brought to our notice, determining that marriage alone is a revocation, for the reason that if there had been no will the wife would have been entitled to a distributive portion of the husband's estate; and the court assumes that the husband did not intend by will to put her in a worse condition than if he had made none. But we think that the weight of authority is against revocation by marriage alone for the reason already given; and that the courts in many States in which the wife shares with the children in case of intestacy, are against revocation by marriage alone.

In 1821 a statute was passed which provided that no devise of real estate should be revoked except by burning,

canceling, tearing or obliterating it by the testator or by some person in his presence by his direction, or by a later will or codicil. Thereupon revocation, by parol or by presumptions or inferences drawn from the pecuniary condition of the wife, or from the manner or place of keeping a will, became and continued to be impossible until the statute of 1885 went into operation. The statute of 1821 applied to every will containing devises of real estate and every will containing both devises of real estate and bequests of personal property. That is, the presence of a devise of real estate protects the bequest of personal property from every other than statutory revocation, and, so far as that statute is concerned, when a testator executed a valid will for the disposition of both real and personal estate and subsequently married and died, leaving his will unchanged, even if it made no provision for the wife, the law did not revoke a part of it for the purpose of making it express what is assumed, contrary to his written declaration, to have been the real intent of the testator, because thereby would come into operation the assumption that the partial will was contrary to his plan for the division of his estate. Either the scheme of the law is to govern the distribution of the estate in its entirety or the scheme of the testator. A distribution the result of assumption in part and in part of fact, would be offensive both to the law and to the testator.

In 1885 (Session Laws of 1885, ch. 110, sec. 135), a statute was passed as follows: "If, after the making of a will, the testator shall marry, or if a child is born to the testator, and no provision is made in the will for such contingency, such marriage or birth shall operate as a revocation of such will."

As a rule of interpretation all statutes are to operate prospectively unless they contain language unequivocally and certainly retrospective. The above statute looks forward and not backward. It can be said to be a remedial statute only in the sense that all statutes are passed because they are expected to benefit the public either by lifting bur-

dens or conferring privileges. It is not the casting of a common law rule into the fixed form of a statute; for there was no such rule in existence. It is the gift of a right to a wife to demand and receive a greater share of her husband's estate, under specified circumstances, than she previously could receive. We may be of opinion that the right given to the wife in this statute should have been given to her long before; but that is not a valid reason why a law giving additional rights should operate retrospectively. Possibly estates in like situation with the one before us have been settled and property vested; possibly wrong would be inflicted if we should give retrospective effect to this statute.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

Revocation of wills.—Marriage and birth of issue.—As stated in the principal case, the marriage of a male testator *together with* birth of issue, was, at common law, a revocation of a will previously made. *Sprague v. Stone*, Amb. 721; *Overbury v. Overbury*, 2 Show. 242; *Brown v. Thompson*, 1 Eq. Cas. Abr. 413, pl. 15; *Lugg v. Lugg*, 2 Salk. 592; *Eyre v. Eyre*, 1 P. Wms. 804, n.; *Langford v. Little*, 2 Jones & L. 633; *In re Sherley*, 2 Curt. 657.

But this general rule was subject to qualification, and marriage with birth of issue did not operate as a revocation if the will did not dispose of the whole estate of the testator; *Kenebel v. Scrafton*, 2 East, 541; *Marston v. Fox*, 8 Ad. & E. 14, 57; *Cf. Brady v. Cubit*, Doug. 31; nor where the wife and child were both provided for in the will or by settlement made prior to its execution. *Marston v. Fox*, 8 Ad. & E. 14; 2 Nev. & P. 504; *Israell v. Rondon*, 2 Moore, P. C. C. 51; *Kenebel v. Scrafton*, 2 East, 530.

In Indiana and in Texas, it would seem that the common law rule still prevails, and that marriage alone is insufficient to revoke. *Bowers v. Bowers*, 53 Ind. 480; *Morgan v. Davenport*, 60 Tex. 230; *Cf. Tex. Dig. (Paschal)*, §§ 53, 63; *Beach on Wills*, § 63.

But in England and in many of the American States, at the present day, marriage alone without birth of issue acts as a revocation. 1 Vic. ch. 26, § 18; *Stimson's Am. Stat. Law*, § 2876, B.; citing the statutes of

Virginia, West Virginia, Georgia, Kentucky, North Carolina, Rhode Island, Illinois and Connecticut. In South Carolina it is essential to effect a revocation by marriage that the wife or child should survive the testator, and that no provisions have been made for them in the will. Stimson's Am. Stat. Law, § 2676 B. n. 6. And in Alabama, New York, California, Nevada, Washington Territory, Dakota, Montana and Utah, it is the survival of the widow which effects the revocation of a will executed prior to marriage, and then only in case she be not mentioned or provided for in the will or by settlement. Stimson's Am. Stat. Law, § 2676, D.; *Havens v. Van Den Burgh*, 1 Denio, 27; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Beach on Wills*, § 68.

Revocation by parol.—Since the enactment of the Statute of Frauds in England, 29 Car. II, ch. 8, § 6; *Of*, 1 Vic. ch. 26, § 20, and similar statutes in most of the American States, Stimson's Am. Stat. Law, § 2672, A., B., C. and E., written wills can not be revoked effectively by spoken words unaccompanied by some physical act, such as cutting, tearing, burning, or other mutilation of the instrument. *Beach on Wills*, §§ 54 and 58; *Toebbe v. Williams*, 80 Ky. 661; s. c. 8 Am. Prob. Rep. 333, 336; *McCune v. House*, 8 Ohio St. 144; *Eyster v. Young*, 3 Yeates, 511; *Boudenot v. Bradford*, 2 Yeates, 170; *Rodgers v. Rodgers*, 6 Heisk. 489.

Thus in *Toebbe v. Williams*, 80 Ky. 661; s. c. 8 Am. Prob. Rep. 333, it was held that verbal statements by the testator that he had not made a will were no evidence of a revocation.

So in *Hylton v. Hylton*, 1 Gratt. 161, declarations made by the testator to the effect that he intended to die intestate, even though there was evidence that he had made a subsequent will which was stolen from him, were held insufficient to revoke the first will, in the absence of any clause of revocation in the second.

But in Pennsylvania, Tennessee, Florida, New Jersey and Maryland, provisions are made for the revocation of wills by spoken words of the testator reduced to writing and read to and approved by him, these circumstances being proven by a designated number of witnesses. Pa. Stats. tit. "Wills," 17; Tenn. Code of 1884, § 3008; Fla. Stats. ch. 200, § 3; Stimson's Am. Stat. Law, § 2675. But in Florida and in New Jersey these provisions apply only to wills disposing of personal estate. Fla. Stats. ch. 200, § 3; Stimson's Am. Stat. Law, § 2675.

Prospective effect of statutes regulating revocation.—The general rule as laid down in the principal case in regard to the prospective effect of statutes not expressly declared to be retroactive, would seem to be too well settled to require the enumeration of cases in its support. The principle has been applied to the general question here in issue, in *Sherry v. Lozier*, 1 Bradf. 437, and more particularly in the case of *In re Lozier*, 79 Ill. 99, the former case holding that a statute regulating the manner of

revoking wills does not extend to a will revoked before its enactment; and the latter that a statute providing that "marriage shall be deemed a revocation of a prior will," is prospective in effect and not applicable to marriages made before its enactment. Beach on Wills, § 54.

See, also, *Gay v. Gay*, 35 *supra*, and the cross-references.

THOMAS vs. MORRISETT.

[76 Georgia, 384.]

FOREIGN WILLS.—GENERAL AND LIMITED ADMINISTRATION.—
CHARITABLE BEQUESTS.—RESTRICTIONS UPON TESTAMENTARY POWER.

A valid judgment of another State determining the domicile of a deceased person is conclusive as between the parties, and the question can not be opened and enquired into in proceedings involving the same issues in the courts of this State.

No general administration should have been granted when there was a will in existence which was afterwards proved and admitted to probate in the State of the testator's domicile; nor should a partial or limited administration have been granted in this State where no resident of this State was interested in the estate either as creditor, legatee, or distributee.

Restrictions of testamentary power with respect to charitable bequests in this State are not applicable to the will of a testator domiciled in a foreign State, nor is probate to be denied because of the existence of void bequests.

APPEAL from a judgment of the Superior Court of Muscogee County.

Thomas & Chandler, McNeill & Levy, E. H. Orr, and Harrison & Peebles, for the plaintiff in error.

Smith & Russell, and *E. P. Morrisett*, for the defendant.

HALL, J. That the personal property of a deceased person passes and is to be administered according to the law

of his domicile, is a clear proposition by the law both of England and of this country, and indeed of every other country in the world where law has the semblance of science. Such property has no locality, but is subject to the law that governs the person of the owner, both with respect to its disposition and transmission, either by succession or the act of the party. If he dies it is not the law of the country in which the property is, but the law of the country of which he is a subject, that will regulate the succession. It is to be distributed according to the *jus domicilii*, as we decided in *Grote and another, guardians, v. Pace, adm'r* (71 Ga. 231, head-note 3c, 237, and citations there). The testatrix in this case died in Muscogee county, Georgia, having previously executed her will in Montgomery county, Alabama, to which she annexed a codicil in Harris county, Georgia; after this codicil was executed, she transmitted it, together with her will, to her executor, who then resided in Montgomery, Alabama, where he has since continued to reside. She left no real estate in Georgia, or elsewhere, so far as appears from the record. At her death, the only personal property she had in Georgia was a trifling sum of money, about one dollar, deposited in a bank in Columbus, and a debt due from parties residing here, secured by a mortgage on lands in this State, which under our law conveyed no title to the same, but created only a lien thereon. (Code, § 1954.) This will was propounded for probate by the executor in the court of probate of Montgomery county, Alabama, and its probate in that court was resisted by all the heirs at law, upon the ground that the court had no jurisdiction of the matter, because the testatrix was not domiciled in that county and State at the time of her death, but then had her domicile in Muscogee county, in the State of Georgia. Upon the trial of the issue, judgment was rendered by the court overruling the *caveat*, and admitting the will to probate and record, from which an appeal was taken by the heirs at law to the Supreme Court of Alabama, where the judgment of the lower court was affirmed. Soon after the will

was presented for probate to the Alabama court, and before judgment was rendered on the issue tendered in that court by the heirs at law, Grigsby E. Thomas, at their instance, applied to the court of ordinary of Muscogee county, where testatrix died, and obtained general administration upon her estate, as though she had died intestate. At the termination of the proceedings touching the probate of the will in the Alabama courts, the executor named in that will made application to the court of ordinary of Muscogee county to vacate and revoke the administration it had granted on the estate, and that application being refused on the showing made by the administrator, the executor took an appeal to the superior court, and on the appeal trial, a judgment was rendered abating and revoking the administration, and to this Thomas, the administrator, excepted and assigned various errors to the judgment then awarded.

Whether such assignment of errors can be upheld will depend in large measure upon the validity of the proceedings in the courts of Alabama touching the probate and record of the will and the force and effect to be given to their judgment in this State. It may be laid down as a general proposition applicable to the proceedings and judgments of the courts of other States of the Union, that, by the Constitution of the United States, Art. iv, § 1, they are entitled to have full faith and credit given to them in this State, as well as in every other State; and by the act of Congress of May 19th, 1790, passed in pursuance of this clause of the Constitution, prescribing the manner in which such records are to be exemplified and the effect to be given them in other States, it is declared in express terms that they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from which the said records are or shall be taken." To the same effect is the act of Congress, approved 27th March, 1804. Both of these acts are appended to section 3830 of our Code. Giving to the judgment of the court of probate of Mont-

gomery county, Alabama, affirmed by the Supreme Court of that State, the full faith and credit as it has by law or usage in the State where rendered, we are led to inquire whether the issues passed upon and concluded by that judgment can be opened and enquired into again in a proceeding pending in our courts substantially between the same parties and involving the identical issue. The lower court held that it could not, and rejected all offers of testimony tending to that end. There can be no doubt of the correctness of these decisions, unless there is something peculiar in the question of domicile made by the heirs at law of the testatrix, which was determined against them, as appears from and is necessarily included in the judgment of the probate court; and this, we are satisfied, forms no exception to the general rule. We determined this precise point in *Lord v. Cannon*, at the last term of this court. (75 Ga. 300.)

Conceding to this judgment in our courts the full faith and credit to which it is entitled by the law and usage of the courts of Alabama, we agree with the superior court that no general administration should have been granted on an estate when there was a will in existence, which was afterwards proved and admitted to record. This is a well settled principle, recognized both by judicial decisions and text-writers. In *Fields, et al. v. Carlton, et al.*, decided at the last term of this court (75 Ga. 554), we held that, where a will had been proved in this State, a grant of administration upon the estate was void, and to this effect was the decision of the Supreme Court of the United States in *Griffith v. Frazier* (8 Cranch, 9), and to these many others might be added, but it would be unnecessary labor, as there is not an authority which questions the point there ruled. Applied to an administration granted before a will, which was afterwards established, was discovered, the same principle would work its revocation, except as to such portions of the estate as had been fully administered prior to its production and probate. (Williams' Ex'rs [Perkins' ed.], 643, 644, *et seq.*, and citations

in foot notes; *Jennings v. Moses*, 38 Ala. 402, is directly, on the point. Compare with *Curtis v. Williams*, 33 Ala. 570.) These principles are not varied in the slightest degree by the fact that the will has been proved in another State, provided that the testator had his domicile there at the time of his death, and *a fortiori*, where the jurisdiction has been contested by the heirs at law upon the ground that the forum taking cognizance of the probate was not that of the domicile, and that question has been adjudged against them. In this respect, it is important to distinguish between general and limited administrations, such as administrators *ad colligendum*, *pendente lite*, *durante minoritate*, *durante absentia*, *de bonis non* or *de bonis non cum testamento annexo*; in short, such as are required to complete an administration already begun and partially, but not completely, executed, or such as are auxiliary to the principal or general administration, and are necessary either to obtain such an administration, or, after it is granted, to render it effectual and complete.

In this case there was no necessity for any one of these limited or partial administrations. This application for general administration was made and granted pending proceedings to prove this will in a sister State, of which the parties at whose instance it was taken had full knowledge, as is evidenced by the fact that they were parties to those proceedings. It is plain that they at least sought by this proceeding to obviate the force of any judgment that might be rendered against them in Alabama, and in this indirect mode to accomplish what they could not effect by a resort to more open and direct methods; and when the judgment was rendered against them, thus to prevent its receiving here the full faith and credit to which it is entitled, not only under the supreme law of the land, but under that liberal spirit of comity and justice which our own Code and decisions enjoin. (*Guerard v. Guerard*, 73 Ga. 506.) The purpose of this administration was manifestly collusive, and for that reason it was void. (Schouler's *Ex'rs and Adm'rs*, § 91, and citations.)

The rights and property of the testator in this State, as we have seen, consisted only in a small sum of money deposited in a bank and a considerable amount of choses in action secured by notes and mortgages. No resident of the State was interested in her estate, either as creditor, legatee or distributee, and there had been no valid grant of administration by our courts upon the estate. There was no necessity for the administration to collect the assets belonging to it and to transmit them to her representative in Alabama. By pursuing the directions of our Code, he could accomplish these purposes as effectually and with much less expense than it could be done through the medium of this administration. That he had ample power under our law, in virtue of his Alabama letters testamentary, to check this deposit from the bank and to institute suits and recover the amount of indebtedness to her from citizens of this State, and to enforce all liens given for their security, just as though these letters testamentary had been granted by our local tribunal, see Code, §§ 2614 to 2618, both inclusive, and citations.

But it is insisted that there was a necessity for this administration to prevent the violation of the public policy of the State, inasmuch as this testator, whose heirs at law were her children, by her will devised more than one-third of her estate to certain charitable, religious and educational institutions to the exclusion of her children, and that such devises are declared by our Code (§ 2419), to be void. Such charitable devise, in order to be valid, must be in a will executed at least ninety days before the death of the testator. This will contains other bequests and appoints an executor; and whether the charitable bequests be invalid or not, that fact does not interfere with the administration of the estate under the will. It was expressly decided, in *Wetter, guardian, et al. v. Habersham, et al., executors* (60 Ga. 194), that where a will was properly executed by a person having testamentary capacity, the court should order it to probate and record, leaving all questions of construction and the fate of charitable or other particular be-

quests for action of the parties or future direction in the proper court, as the case may require. This is the deduction drawn in that case from the decision in *Reynolds v. Bristow* (37 Ga. 283), which was reviewed and affirmed by this court. In other words, this entire estate passes into the hands of the executor, and he is to administer it under the direction of the court having jurisdiction of the matter; and as it has already been shown that this belongs to the courts of Alabama, we are relieved from the consideration of the question, and refer it to those tribunals for their adjudication. In fine, this is an Alabama and not a Georgia will.

Neither the act of the 25th of September, 1883 (Acts, pp. 100 and 101), nor that of the 16th of December, 1878 (Acts, 146), of which it is amendatory, or any preceding acts upon the same subject (Code, §§ 2434a, 2435, 2435a, 2435b), contain any expression contravening this view; on the contrary, they are, at least impliedly and necessarily so, in entire accord with, and sustain and support it. They all make provision for the probate and execution of wills made in other States and foreign countries, which are to operate in this State upon property located here, and which is to be administered, as to the property bequeathed in accordance with and under our local law. It would thence follow, upon the general principles we have discussed, without an expression to that effect, in the act of 1883, that no will repugnant to our declared policy, and designed to take effect and to be carried out here, could be valid and operative. This disposes of all the questions made in the record and sustains the several rulings, as well as the entire judgment, of the superior court.

Judgment affirmed.

BLANDFORD, J., concurring.

JACKSON, C. J., dissenting.

See, also, *Stark v. Parker*, 1 Am. Prob. Rep. 550; *Besançon v. Brownson*, Id. 461; *Coates v. Mackey*, 2 Id. 181; *Russell v. Hartt*, 2 Id. 297;

Speed v. Kelly, 2 Id. 553; Patterson v. Pagan, 3 Id. 327; Morin v. Railroad, 4 Id. 462; McCartney v. Osburn, 5 Id. 594; Williams v. Nichol, 5 Id. 43; Van Gieson v. Banta, 5 Id. 426; Dickey v. Vann, *supra* 46, and the cross-references.

REED vs. HAZLETON.

[37 Kansas, 321.]

A WILL IN THE FORM OF A CONTRACT.

An instrument in writing may be a contract in one part thereof, concerning one piece of property, and in another part may be testamentary in relation to other and distinct property. If an instrument in writing concerning real estate passes a present interest therein, although the right to its possession and enjoyment may not accrue until some future time, it is a contract; but if the instrument passes an interest or right only upon the death of the maker, it is testamentary in its nature.

ERROR from Ottawa District Court. The plaintiff, as executor of Henry Ricket, brought this action to recover possession of eighty acres of land which the defendant held and claimed title to under the following instrument:—

“ARTICLE OF AGREEMENT.

“STATE OF KANSAS, DICKINSON COUNTY, ss.—March 8, 1883.—This agreement, made by and between Henry Ricket and John Hazleton, certifieth that Henry Ricket of the first party lets unto John Hazleton of the second part, 18 head of cattle, to be kept on section 13 and sheltered on the northwest quarter of section 13, town 10, range 1 west, of Ottawa county; one-half of the increase to be divided equally between said parties when sold. Henry Ricket agrees to furnish one pony for the use in herding said cattle by John Hazleton of the second party; said second party is to cut hay and put it up in good season, and carefully attend the cattle by proper shelter and feeding; said Henry Ricket, when able, will assist in attending the cattle.

"Henry Ricket, of the first party, during his lifetime will retain full and peaceful possession, and will make such improvements on said premises from time to time that he feels himself able. And John Hazleton, of the second party, shall properly care for and see to the wants and interests of the said Henry Ricket in health and sickness. And the said John Hazleton to have his home with Henry Ricket and have the use of all farming implements during the lifetime of the said Henry Ricket, and after the death of the said Henry Ricket, of the first party, the right and title of the north half of the northwest quarter of section 13, town 10, range 1 west, of Ottawa county, Kansas, shall vest in the said John Hazleton, of the second party.

"One-half of the present cattle, 18 head, to be divided when sold, between said parties.

His
HENRY X RICKET.
mark.
JOHN HAZLETON."

R. F. Thompson, for the plaintiff in error.

Garver & Bond, for the defendant in error.

HOLT, C. The plaintiff in error complains, first, that the court was not authorized to make certain findings of fact under the pleadings in the case which were made; and second, that the findings of fact were not sufficient to authorize the conclusions of law and the judgment of the court. The question to be decided in this case is, whether the writing signed by Henry Ricket and John Hazleton, called an article of agreement, is in reality a contract, or an instrument testamentary in its character. If it is a contract so far as it relates to the land in dispute, then the judgment of the court below is correct, and should be affirmed; if it is testamentary, it should be reversed. We have not been able without difficulty to determine the nature of this written instrument. It was evidently prepared by some one not accustomed to drawing written instruments, and unacquainted with the usual legal terms. We have not been able to find an instrument like this in all the numerous authorities cited by the parties, and such authorities have

been of little service to us, except as they contain the general rules that mark the distinction between contracts and papers testamentary, and we have found it much more difficult to apply the rules of law to this article of agreement than to ascertain what the true rules are.

There are two parts to the instrument which we are now considering: one concerning the disposition of his personal property by Henry Ricket, which we are not called to pass upon, directly at least; the other having reference to his real estate, the title and possession of which is the subject of this controversy. The first part of this instrument is a contract between Ricket and Hazleton; but from that alone it does not follow that the second part is a contract also. One provision of an instrument in writing may be a contract, and another, concerning different property, testamentary. (*Kinnebrew v. Kinnebrew*, 35 Ala. 628.) We shall not discuss the alleged error that the findings of fact are not within the issues of this case; if they are, they would not alter the construction which we believe ought to be placed upon this instrument; but we will say in passing to the main question to be decided in this action, that the fourth finding is probably within the objection made by the plaintiff. The rule established by the authorities, and applicable to this case, is substantially this: If an instrument of writing passes a present interest in real estate, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but if the instrument does not pass an interest or right until the death of the maker, it is a will, or testamentary paper. (*Sperber v. Balster*, 66 Ga. 317; *Turner v. Scott*, 51 Pa. St. 126; *Burlington University v. Barrett, Ex'r*, 22 Iowa, 60; 19 Cent. L. J. 46.) We shall accept this as the correct rule, and apply it to this instrument. Did Ricket by this instrument give, or intend to give, to Hazleton, a present interest in this land? Let us examine. The first provision therein contained is that Ricket shall retain full and peaceful possession of the premises during his lifetime, and the last thing said of the land is, that after his death the title thereof shall vest in Hazle-

ton. These two clauses embrace all that is stated directly about the title and possession of this land. It is provided, however, that Hazleton shall have his home with Ricket. Where? We might possibly, perhaps fairly, infer upon these premises, though it would be but an inference, and that should not control the provisions which are plainly written. Before his death Ricket left this tract; would Hazleton, under the terms of this instrument, have been compelled to go too, in order to keep his home with Ricket? It will be noticed that it was not Ricket that was to live with Hazleton, but Hazleton who was to have his home with Ricket. This instrument, as we have suggested, may have been inartistically drawn so far as legal forms are concerned, but when it has reference to the possession of this land during the lifetime of Ricket, its language is strong and explicit. He was to retain—to hold, not to lose—full, *i. e.*, complete, entire—and peaceable possession. There is no joint possession, sharing it with another, nor was it to be divided, but entire. We cannot, therefore, believe that that part of this instrument which provides that Hazleton should have his home with Ricket gave him any right of possession in this land against Ricket, when it is construed with the unambiguous statement that Ricket should have full and peaceable possession.

Under the view which we take of this instrument, it will be unnecessary to examine the nature of a contract of bargain and sale and a covenant to stand seized to the use of the grantee, which are discussed in the briefs filed in this action. We believe that it ought not to be placed in either of those classes of conveyances. We fail to find in the instrument the ordinary words employed in a conveyance, "give, grant, bargain and sell," nor are there other words of like signification which would establish an intention to convey a present estate. In a word, this article of agreement does not contain any of the usual operative words of a conveyance, with the possible exception of this clause: "After the death of the said Henry Ricket of the first party, the right and title of the land in question shall vest in the

said John Hazleton of the second party." That provision had no present operation, and could be revoked by the grantor at any time. It was testamentary. (*McKinney v. Settles*, 31 Mo. 541; *Tiedeman on Real Property*, 803.)

By this instrument the possession of the personal property was given to Hazleton, while Ricket retained possession of the real estate. When the provisions are so explicit in reference to Hazleton's possession of the personal property, we cannot believe that the failure to make any reference to the right of Hazleton to possession of the real estate in this instrument of writing, was unintentional. The old man wisely kept possession and control of his home, to prepare for the possible change in the feelings of himself and Hazleton. Hazleton was not without recourse if he had performed services for which he had not been paid. He could have presented his claim against the estate, and the courts were open to aid him in obtaining his dues.

It is recommended that the judgment of the court below be reversed.

By the court: It is so ordered.

All the justices concurring.

See, also, *Cowley v. Knapp*, 1 Am. Prob. Rep. 390; *Castor v. Jones*, 3 Id. 184; *Regan v. Stanley*, 8 Id. 251; *Kelleher v. Kernan*, 3 Id. 417; *Byers v. Hoppe*, 4 Id. 218.

HOLLAND vs. TAYLOR.

[111 Indiana, 121.]

SUBJECT OF BEQUEST.—PROCEEDS OF LIFE INSURANCE.

Where the by-laws of a mutual benefit association, not a domestic corporation, provide for the payment of a sum of money to the dependents of a member and

fix definitely the manner of changing the beneficiary, upon the death of the assured, unless a change has been made in the manner specified, the beneficiary named in the certificate becomes the absolute owner of the fund, unaffected by a will attempting to make a different disposition thereof; and, if the beneficiary is a minor under guardianship, the guardian is entitled to the possession and control of the money as against the assured's executors.

APPEAL from a judgment of the Marion Circuit Court.
The facts appear in the opinion.

C. Byfield and *L. Howland*, for the appellant.

V. Carter, for the appellees.

ZOLLARS, C. J., On the 25th day of August, 1884, the Royal Arcanum, whose principal office and Supreme Council are in Boston, issued to Charles D. Taylor, of Indianapolis, a certificate in these words :

“ROYAL ARCANUM BENEFIT CERTIFICATE.

“This certificate is issued to Charles D. Taylor, a member of Hoosier Council No. 394, Royal Arcanum, located at Indianapolis, Ind., upon evidence received from said council that he is a contributor to the widows and orphans' benefit fund of this order, and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the Supreme Secretary's office, be made a part of the contract; and upon condition that the said member complies in the future with the laws, rules and regulations now governing said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund. The conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay, out of its widows and orphans' benefit fund, to Samuel Taylor and Martin V. McGilliard (executors), for the benefit of Anna Laura Taylor (daughter), a sum not exceeding three thousand dollars, in accordance with and under the provisions of the laws governing the said fund, upon satisfactory evi-

dence of the death of said member, and upon the surrender of this certificate: Provided, that the said member is in good standing in this order at the time of his death; and provided, also, that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order.

"In witness whereof, the Supreme Council of the Royal Arcanum has hereunto affixed its seal, and caused this certificate to be signed by its Supreme Regent, and attested and recorded by its Supreme Secretary, at Boston, Massachusetts, this 25th day of August, 1884.

"JOHN HASKELL BUTLER, Supreme Regent.

"Attest: W. O. ROBSON, Supreme Secretary."

On the back of the certificate is this form:

"Form of change of beneficiary. Council —, No. —, R. A. To —, 18—. Supreme Secretary S. C. R. A., I hereby surrender and return to the Supreme Council of the Royal Arcanum the written benefit certificate No. —, and direct that a new one be issued to me, payable to —.

"[Seal of sub-council.] [Member's signature.]

"Attest: — — —, Secretary."

The Royal Arcanum is governed by a constitution and by-laws, sections two and three of the by-laws being as follows:

"Section 2. Each member shall enter upon his application the name or names of the members of his family, or those dependent upon him, to whom he desires his benefits paid, subject to such future disposal of the benefit among his dependents as the member may thereafter direct, and the same shall be entered in the benefit certificate according to said directions," etc.

"Section 3. A member may, at any time, when in good standing, surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries dependent upon him as such member may direct, upon the payment of a certificate fee of fifty cents."

On the 22d day of August, 1884, the day on which, as alleged in appellees' answer, Taylor applied for the above

certificate, he made his will. In that will he recited as a fact, that he had in his possession a policy of life insurance for three thousand dollars, issued to him by the Royal Arcanum, and payable to Samuel Taylor and Martin V. McGilliard, his executors, for the benefit of his daughter, Anna Laura Taylor.

In another item of the will the testator directed that, in the event of his personal property being insufficient to pay his debts, the first interest or earnings of the life insurance fund should be applied to that object, the principal to remain intact.

In another item he directed that after his death the insurance fund should be collected by his "said administrators," and safely invested in real estate loans, and that the interest derived therefrom should be first used in the payment of his debts, and the remainder in the education of his daughter, Anna Laura, according to the best judgment of his "administrators;" that in the event of his daughter being left motherless, the fund should be used for her benefit in accordance with the judgment of his "administrators;" and that when she should arrive at the age of twenty-one years, the fund, with accumulated interest, should be paid to her.

By another item of the will, and a codicil thereafter made, the testator directed that in the event of the death of his daughter before arriving at the age of twenty-one years, the insurance, should be given and divided by his administrators, a certain portion to his wife, another portion to his father, another portion to a person neither related to nor dependent upon him, and still another portion to the American Baptist Home Mission Society.

In another item appellees, Samuel Taylor and Martin V. McGilliard, were designated as the executors of the will.

The assured and testator, Charles D. Taylor, died in February, 1885.

Subsequently, appellees were appointed and duly qualified as executors of the will, and collected the insurance

fund from the Royal Arcanum. Subsequent to the death of the testator, also, appellant was appointed guardian of the person and estate of the daughter, Anna Laura.

In May, 1885, he filed his petition in the Marion Circuit Court, asking therein for an order upon the executors to pay over to him, as such guardian, the fund so collected by them from the Royal Arcanum.

That petition, and the answer thereto by the executors, state the facts substantially as above recited.

The court overruled a demurrer to the answer, and held that the executors were entitled to the fund, to be disposed of as the will directs.

The question for decision is, shall the benefit fund remain in the hands of the executors to be managed, disposed of, and distributed as the will directs, or ought it to be turned over to the guardian as the absolute property of the daughter, Anna Laura Taylor.

Upon a fair construction of the certificate, the by-laws of the order are a part of the contract. Therefore, by accepting the certificate, the member (Taylor) obligated himself to comply with the by-laws, and agreed that payment should be made to the executors for the benefit of his daughter, unless the certificate should be surrendered by him, and another issued at his request, in accordance with the laws of the order.

He, and all concerned, would have been bound by the by-laws, even though there had not been such a reference to them in the certificate. Benevolent associations, such as the Royal Arcanum appears to be, are in the nature of mutual insurance companies. Persons who become members of such associations, and accept certificates, are bound to take notice of the by-laws; they enter into and become a part of the contract the same as if they were written out in the certificate. (*Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind. 262.)

Whatever right beneficiaries have in life policies, they have by virtue of the contract between the insurance company and the assured. In the case of an ordinary insurance

policy, the rights of the beneficiaries in the policy, and to the amount to be paid upon the death of the assured, are vested rights, vesting upon the taking effect of the policy. These rights cannot be defeated by the separate, or the combined acts of the assured and insurance company without the consent of the beneficiary. (*Harley v. Heist*, 86 Ind. 196; 44 Am. R. 285, and authorities there cited; *Damron v. Penn Mutual Life Ins. Co.* 99 Ind. 478, and cases there cited.)

As in other cases, so here, whatever right or power Taylor, the assured, had to and over the certificate, was by virtue of the terms of the certificate and the by-laws of the order, which together constituted the contract between him and the order. And whatever rights the beneficiary, Anna Laura, had, or now has, to the fund to be, and in this case paid, upon the death of the assured, her father, she had, and has, by virtue of the same contract.

It should be observed that the Royal Arcanum is not a domestic corporation, and hence not affected by section 3848, R. S. 1881. (*Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind. 593.) If, then, the Royal Arcanum were to be treated as an ordinary life insurance company, and the certificate as an ordinary life policy, it would be clear that Taylor, the assured, had no authority, by will or otherwise, to change the beneficiary, or to in any way affect her rights without her consent.

For many, and, indeed, for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance, governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance. (*Presbyterian Mutual Assurance Fund v. Allen*, *supra*; *Elkhart Mutual Aid, etc., Association v. Houghton*, 103 Ind. 286; 53 Am. R. 514; *Bauer v. Samson Lodge, Knights of Pythias*, *supra*.)

The most usual difference is the power, on the part of the assured in mutual benefit associations, to change the

beneficiary. But as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the association, or is reserved to him by the constitution, or by the laws of the association, or by the terms in the certificate.

In the case before us, the right and power of the assured, Taylor, to change the beneficiary was reserved to him by the by-laws of the order, and recognized in the certificate. Because of that reservation, the beneficiary, Anna Laura, did not have a right in and to the certificate, and the amount to be paid upon the death of the assured vested in such a sense that it could not be defeated. But it would be saying too much to say that she had no rights. She was the beneficiary named in the certificate. The executors, so far as shown by the terms of the certificate, had no right at all either in or to the certificate or to the amount to be paid by the association. So far as shown by that certificate, they were mere trustees to collect the amount for the use and benefit of the real beneficiary, Anna Laura. So long as the contract remained as executed, she had the right of a beneficiary, subject to be defeated by a change of beneficiary by the assured.

So long as the certificate remained as executed, the assured had reserved to himself the power to change the beneficiary, and that was the extent of his right in, or power over, the certificate, or the amount agreed to be paid at his death. He had no interest in or to either the certificate or the amount agreed to be paid, that would have gone at his death to his personal representatives. By virtue of the by-laws and the certificate, which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary. That same contract fixed the mode and manner in which that change might be made; and we think that, taking the by-laws and certificate to-

gether, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract. The agreement was that he might change the beneficiary by surrendering the certificate and taking another payable to such beneficiary "dependent upon him" as he might direct.

In that contract Anna Laura, the beneficiary, had such an interest as that she had, and has, the right to insist that in order to cut her out, the change of beneficiary should be made in the manner provided in the contract.

The contract clearly contemplated that the change should be made and perfected by the assured during his lifetime.

It was not contemplated that he might make such a change by will, of which neither the association nor the beneficiary named in the certificate would have notice before his death, and which would not take effect until after his death.

In many of the cases reported in the books, it appears that such associations had provided in their by-laws and certificates that changes of beneficiaries might be made by the will of the assured.

In the absence of such provisions, the decided weight of authority is, that such changes can not be made by will, and that, to be effectual and binding upon the beneficiary named in the certificate, they must be made in the mode and manner provided in the by-laws and certificate; in other words, that they must be made in the manner and mode provided in the contract.

From the by-laws and certificate before us, it is clearly apparent, also, that the undertaking on the part of the association was not to pay a sum of money for the benefit of

the estate of the assured, but for the benefit of members of his family, and those dependent upon him.

Under the second by-law set out above, the member was required to enter upon his application the name or names of the members of his family, or those dependent upon him, to whom he desired his benefits paid, subject to such future disposal of the benefits among his dependents as he might thereafter direct.

By the third by-law the association agreed that, upon a surrender of the certificate by the member, it would issue another to him, payable to such beneficiary or beneficiaries dependent upon him as he might direct. Thus, under the by-laws, the assured might substitute a new beneficiary, provided such beneficiary was a member of his family or dependent upon him, and provided the change of beneficiary was made in the manner prescribed in the by-laws.

Taylor, the assured, did not make a change of beneficiary in the manner prescribed in the by-laws, nor did he name as new beneficiaries members of his family only, or those dependent upon him. He disregarded the provisions of the by-laws prescribing the manner of changing, and prescribing what class of persons might be named as beneficiaries, and attempted to make a change by his will. It is true, that he did not attempt to deprive the daughter of all rights as beneficiary, but, treating the certificate as though it belonged absolutely to him, undertook to dispose of the amount to be paid at his death by directing how it should be managed by the executors of his will, and directing that they should use the income from it as assets of his estate for the payment of his debts. And finally, without changing the beneficiary in the manner prescribed in the by-laws, he undertook to deal with the certificate and the amount to be paid upon it at his death as though the daughter had no right to either, except as might be bestowed by his will, and as though they both belonged to him to be disposed of by will as his property. And thus treating them, he undertook to dispose of the fund by giving it to others, neither members of his family nor dependent upon him, provided

the daughter did not attain the age of twenty-one years. Without further elaboration upon this branch of the case, our conclusion is, that Anna Laura, having been named in the certificate as the beneficiary, and there having been no change of beneficiary in the manner prescribed in the by-laws of the association, she became the absolute owner of the insurance fund upon the death of her father, unaffected by the will. As fully sustaining our conclusion, we cite the following cases: *Masonic Mutual Benefit Society v. Burkhart* (110 Ind. 189); *Supreme Lodge, Knights of Pythias, etc. v. Schmidt* (98 Ind. 374); *Stephenson v. Stephenson* (64 Iowa, 534); *Hellenberg v. District No. 1, Independent Order of B'nai Brith* (94 N. Y. 580); *Vollman's Appeal* (92 Pa. St. 50); *Eastman v. Provident Mutual Relief Association* (20 Cent. L. J. 266); *Coleman v. Supreme Lodge, Knights of Honor* (18 Mo. App. 189; 14 Ins. L. J. 635); *Daniels v. Pratt* (143 Mass. 216); *Supreme Lodge, Knights of Honor v. Naim* (22 Cent. L. J. 274); *Gould v. Emerson* (99 Mass. 154); *Kentucky Masonic Mutual Life Ins. Co. v. Miller* (13 Bush. 489); *Hogle v. Guardian Life Ins. Co.* (1 Big. L. & A. Ins. Rep. 597); *Worley v. Northwestern Masonic Aid Ass'n* (10 Fed. Rep. 227; 11 Ins. L. J. 141; 3 McCrary R. 53); *McClure v. Johnson* (56 Iowa, 620); *Maryland Mutual Benevolent Society v. Clendinen* (44 Md. 429; 22 Am. R. 52).

Appellee's counsel cite and rely upon the case of *Splawn v. Chew* (60 Texas, 532). That case is not in harmony with what we hold here as to the want of power by the assured to change the beneficiary by a will; nor is it in harmony with the cases above cited. It was held in that case, that the by-law providing a mode for changing the beneficiary was directory only; that it was for the benefit of the association alone, and might be waived by it; that the association not objecting, the assured might change the beneficiaries by a will, and that the beneficiaries named in the certificate could not, after the death of the assured, be heard to say that there had been no change of beneficiaries in the manner provided in the by-laws.

As we have already said, in effect, in the case before us,

our judgment is that the mode and manner of changing the beneficiary was as obligatory upon the contracting parties and all concerned as was the reservation of the power to the assured to make such change. The beneficiary, Anna Laura, did not have an indefeasible interest in the contract evidenced by the certificate, nor in the amount to be paid upon it upon the death of the assured, but she had an interest in them subject to be defeated by the change of beneficiary in the mode and manner provided by the by-laws which were a part of the contract. (*Supreme Lodge, Knights of Pythias, etc. v. Schmidt, supra.*)

Taylor, the assured, neither changed, nor attempted to change, the beneficiary in the mode and manner provided in the by-laws. He could not accomplish that end, nor affect the ultimate rights of the beneficiary by a will. Upon his death, therefore, Anna Laura became entitled to the amount to be paid upon the certificate, as her absolute property; appellees' executors, having collected from the Royal Arcanum, hold the amount so collected in trust for her, but they have no right to control, manage, and dispose of the fund as directed by the will, because, as to that fund, the will is of no effect.

The fund belonging absolutely to her, her guardian is entitled to it, to control and manage it as the court may direct until she shall have arrived at the years of majority. The court below, therefore, erred in overruling the demurrer to appellees' answer.

In answer to counsel, it is sufficient to say that the fact that Taylor made his will upon the same day that he requested the certificate to be so made as that the amount should be paid to his executors for the benefit of his daughter, can make no difference. The will constituted no part of the contract between him and the Royal Arcanum. That order agreed in the certificate to pay the amount to "Samuel Taylor and Martin V. McGilliard (executors) for the benefit of Anna Laura Taylor (daughter)," but it in no way consented that the beneficiary should be changed, nor that the fund should in any way be turned away from her by the

will of the assured ; indeed, there is nothing to show that the agents and officers of the order had knowledge that anything of the sort had been attempted by the assured.

The judgment is reversed, at the costs of appellees, and the cause remanded, with instructions to the court below to sustain appellant's demurrer to the answer, and to proceed in accordance with this opinion.

The Beneficiary of life insurance cannot be changed by will.—The question involved in the principal case was discussed in *Olmstead v. Masonic Mutual Benefit Society of Kansas*, 37 Kan. 93, where, in the course of the opinion, the court said:—"The general rule applicable to policies of ordinary life insurance companies is, that the rights of the beneficiary are vested when the policy is taken out, and the assured cannot, by will, deed or otherwise, change the beneficiary or transfer the interest vested without the consent of the beneficiary named in the contract. *Bliss on Life Ins.* § 318. It is insisted that the certificates issued by co-operative insurance companies, like the *Masonic Mutual Benefit Society of Kansas*, are not governed by the rule mentioned, and that in such cases the rights of the beneficiary are not fixed upon the issuance or by the terms of the certificate, but do depend upon the standing of the assured in the society and his rights under the constitution and by-laws of the society; and therefore the member may exercise the power of changing the beneficiary. Among the authorities cited which appear to support this proposition are the following: *Presbyterian Fund v. Allen*, 106 Ind. 598; *a. c.* 7 N. E. Rep. 817; *Legion of Honor v. Perry*, 140 Mass. 580; *Hellenberg v. I. O. B. B.*, etc., 94 N. Y. 580; *Ballou v. Gile*, 50 Wis. 614; *Gentry v. Supreme Lodge*, 20 Cent. L. J. 393; *Benefit Society v. Burkhart*, 10 N. E. Rep. 79; *Swift v. Benefit Association*, 96 Ill. 309.

"However well founded this distinction may be, it is clear that the beneficiary can only be changed and the benefit transferred to another in the manner prescribed by the rules and regulations of the society, and in accordance with the terms of the contract. The contract in this case specifically provided that the benefit should be paid to the wife of the member, or to her legal representatives. The addition of the words "legal representatives" clearly imports that, in case of her death, the benefit should be paid to her heirs or next of kin who fall within the classes mentioned in the charter to whom aid may be given. Thus the contract fixed and limited the persons who might receive the benefit. If we assume, as the authorities appear to hold, that a member of a co-operative society retains the power to change the beneficiary, still he cannot exercise his power except with the consent of the society, and in conformity with the rules and regulations of the society. *Aid Society v. Lupold*, 101 Pa.

St. 111; Vollman's Appeal, 92 Pa. St. 50; Eastman v. Relief Association, 20 Cent. L. J. 266; Hellenberg v. I. O. B. B., etc., 94 N. Y. 580; Presbyterian Fund v. Allen, 106 Ind. 593; Insurance Co. v. Miller, 13 Bush. 489; Gentry v. Supreme Lodge, 20 Cent. L. J. 393."

See, also, Blouin v. Phaneuf, *supra*, 326, and the cross-references.

COVER vs. STEM.

[67 Maryland, 449].

A WILL IN THE FORM OF A BOND.

An instrument to the effect that at the death of the maker thereof, his estate, or executor, should pay a certain amount of money to a designated person, although signed, sealed, witnessed and delivered as a writing obligatory, is nevertheless testamentary in its nature, there being no words to create a *debitum in presenti*; and if, by reason of being attested by but one witness, it fail of effect as a testamentary paper, it cannot on that account be construed as a bond.

APPEAL from a judgment of the Circuit Court for Carroll County.

James A. C. Bond and *William H. Thomas*, for the appellant.

Charles B. Roberts, the Attorney-General, for the appellee.

ALVEY, C. J. This is an action of debt brought by the appellant against the appellee as executor of David Engel, deceased, to recover the sum of three thousand dollars, alleged to be due and owing by virtue of what is described in the declaration as a writing obligatory, made and delivered by the appellee's testator, on the 4th day of Sept., 1884.

The declaration contains several counts, all founded upon the supposed writing obligatory; and which writing was

filed with the declaration, and, by agreement, is incorporated in and made part of the declaration. The appellee demurred to the entire declaration, and the Court below sustained the demurrer, and gave judgment for the defendant. It is from that judgment that this appeal is taken.

The instrument declared on is in the following form :

“Md., September 4th, 1884.

“At my death, my estate or my executor pay to July Ann Cover the sum of three thousand dollars.

“Witness :

DAVID ENGEL, OF P. [SEAL].

“COLUMBUS COVER.”

It is contended, on the part of the appellant, that this instrument is a bill obligatory, and imports a legal obligation of the maker, the time of payment only being deferred until after his death, when his administrator or executor was directed to pay the amount. While, on the other hand, it is contended by the appellee, that the instrument has all the characteristics of a testamentary paper, and did not in any proper sense, create a legal obligation upon the maker, such as that of a bond or single bill.

What the consideration may have been to induce the maker to pass such an instrument, does not appear. But it is insisted that the seal to the instrument imports a sufficient consideration for the obligation of the maker ; and this, as a general proposition, is certainly true, as applied to bonds and deeds generally. But still the question here is, whether the instrument declared on be in its *nature* a bill obligatory, binding and conclusive upon the maker, or whether it be a mere posthumous disposition of three thousand dollars, part of his estate, to be paid by his executor, as any other pecuniary legacy given by the testator.

An obligation is defined to be a deed in writing, whereby one man doth *bind himself to another* to pay a sum of money, or do some other thing. (Shep. Touch., tit. Obligation, p. 367. The same definition is given in Com. Dig., tit. Obligation [B.], and in Bacon's Abr. tit. Obligation [B.].) It is

true no precise form of words is necessary to create a bond or obligation. Therefore, any memorandum in writing under seal, whereby a *debt* is acknowledged to be owing, will obligate the party to pay; for it is said that any words which prove a man to be a *debtor*, if they be under seal, will charge him with the payment of the money. (*Core's Case*, Dyer, 226; Shep. Touch. 368, 369-70, and Bac. Abr. Obligation [B.] and the examples there given of what form of words will be sufficient to create a valid obligation.) It is, however, laid down in Bac. Abr. Obligation (B.) as essentially necessary, to create a valid obligation, that words be employed to declare the intention of the party, and which must clearly denote *his being bound*; "because such obligation is only in the nature of a contract, or a security for the performance of a contract, which ought to be construed according to the intention of the parties." In other words, there must be terms employed to create a *debitum in presenti*, though the *solvendum* may be in *futuro*, and even after the death of the obligor. It would seem to be clear, that the relation of debtor and creditor must be created and subsist in the life-time of the parties to the instrument, though the time of payment may be deferred until after the death of one of the parties. (Shep. Touch. 368, 369; *Hannon v. The State*, 9 Gill, 446; *Carey v. Dennis*, 13 Md. 1; Sto. Pro. Notes, § 27.)

Here, in the instrument before us, there are no words that create a *debitum in presenti*; there are no words that create the relation of debtor and creditor in the life-time of the parties to the instrument; but the words employed simply import a posthumous disposition of a part of the estate of the maker of the instrument, and nothing more.

This case is not substantially distinguishable from the case of *Byers v. Hoppe* (61 Md. 206). In that case, Hoppe, the writer of the letter to Ann Byers, the party to whom the letter was addressed and *delivered*, said: "Ann, *after my death*, you are to have forty thousand dollars; this you are to have, *will or no will*; take care of this *until my death*." That was declared to be a testamentary paper; and the only real distinguishing feature between the paper in that case

and the paper in this is, that the paper in the former was not under seal, and the paper in this case is. That, however, can make no substantial distinction in determining the real character of the instrument; as wills are more frequently executed under seal than otherwise. Nor can the fact that the instrument was delivered to the party to whom payment was directed to be made, change the real nature of the instrument. For the principle is well settled, that an instrument may be in the form of a deed, signed, sealed and delivered as such, and still, if it be apparent that the party intended a posthumous disposition of his property, the instrument not being operative until after his death, such instrument will be regarded as testamentary.

A will is defined to be any instrument whereby a person makes a disposition of his property to take effect after his death. By the terms of the instrument in question, the three thousand dollars are simply directed to be paid out of his estate by his executor. No language could be more expressive of a testamentary purpose. And this Court has declared, in *Carey v. Dennis* (13 Md. 17), adopting the language of Mr. Justice Buller, in *Habergham v. Vincent* (2 Ves., Jr. 231), that "the cases have established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will."

It is urged, however, in argument, that as the instrument in question was made since the Act of 1884, ch. 293, requiring at least two witnesses to bequests of personal estate, it is ineffectual as a testamentary paper, because it has but one witness, and therefore it should, if possible, be construed to have effect as a bond or obligation. But whether the instrument shall be declared a valid obligation, or to have a testamentary character only, must be determined from the terms and provisions of the instrument itself. (*Carey v. Dennis*, 13 Md. 17.) We have shown that the instrument has not the essential terms to create a *debitum*, personally binding the deceased in his life-time; and this construction cannot be affected by the fact, that the instru-

ment being testamentary in its character, must fail of effect, because of insufficient witnesses under the statute.

It follows that the judgment of the Court below must be affirmed.

Judgment affirmed.

See, also, *Fasselman v. Elder*, 2 Am. Prob. Rep. 541; *Reed v. Hazleton*, *supra*, 582, and the cross-references.

SNYDER vs. BAKER.

[5 Mackey, 448.]

LIFE ESTATES AND REMAINDERS.—LIMITATION OVER UPON HAPPENING OF EVENT WHICH HAS FAILED.

An absolute bequest in trust, limited over upon marriage and birth of issue passes, upon the death of the legatee unmarried and without issue, to her executor.

APPEAL from a decree in equity, upon a bill of interpleader to obtain the construction of a will.

William Pinckney Whyte and *Henry Wise Garnett*, for Virginia T. Lewis, legatee.

Leigh Robinson, contra.

HAGNER, J. The bill in this case was filed by Mr. Snyder as trustee under the appointment of this court, for instructions as to the proper distribution of a bequest of \$20,000 under the will of Colonel John Tayloe to his daughter, Virginia.

It avers that Virginia Tayloe died after executing a last

will and testament, by which she bequeathed this \$20,000 to her niece, Miss Lewis, who demands payment of the entire sum ; but that the money is also claimed by the children and grandchildren of the sisters of the said Virginia, who deny the right of the said Virginia to bequeath the said property by her will, insisting that she was only given a life estate in the legacy by her father, and that upon her death, unmarried and childless, it devolved upon her surviving sisters and their children, under the proper construction of the will of Colonel John Tayloe.

The court below sustained the claim of the legatee, Virginia T. Lewis, and from this decree the present appeal is taken in behalf of the grandchildren of Mrs. Carter, one of the sisters of Virginia Tayloe. The clause referred to is as follows :

“I give and bequeath to my daughters, Catherine, Elizabeth M., Virginia and Anne O. Tayloe, \$20,000 apiece, to be invested in United States bank stock, or in government securities, which stock or securities, I do hereby direct that my executors, hereinafter named, shall hold in trust for my said daughters respectively, and shall apply the dividends, interest or profits of said stock or securities to the use and benefit of my said daughters, Catherine, Elizabeth M., Virginia and Anne O. Tayloe, severally and respectively, as the said dividends, interest or profits shall accrue ; and from and after the intermarriage of any of them, then my said executors shall hold the said bank stock or other securities belonging to said daughters so marrying, in trust for the following purposes ; that is to say, in trust for the maintenance of her and her husband during their joint lives ; then in trust for the survivor of the said husband and wife during his or her life ; and after the death of such survivor, then in trust for such issue as she may leave at the time of her death ; and in case she shall die without leaving such issue, then in trust for her surviving sisters (my other daughters), and the issue of any deceased sister, such issue taking such share as the deceased sister, whom they represent, would have taken had she been alive to take ; and it

is my intention that the stock and securities, as also the dividends, interest or profits thereof, shall be utterly free from the power and control of the husbands of my said daughters."

Then follows this provision: "And the better to secure the payment of these my daughters' portions, I do hereby direct that if the funds hereinafter particularly appropriated for the payment of debts and legacies shall be insufficient for the payment of debts and legacies, my estate generally must be charged to make up the deficiency to my said daughters."

Among the familiar principles of law laid down with reference to the interpretation of wills, which it will be well to keep in mind in arriving at a correct construction in the present case are these:

First. It makes no difference whatever, in construing such a bequest as that to Virginia Tayloe, that the property was left in the hands of trustees. The same rules of construction to determine the quality of her estate, whether for life or in fee, are equally applicable to estates placed in trust and those which are not, except so far as the creation of the trust may throw light upon the intention of the testator. (*Fairfax v. Gunn*, 60 Md. 55.)

Again: It is a recognized principle that when a man has undertaken to make a will, it is presumed that his purpose was to dispose of his entire estate. If Colonel Tayloe intended to leave to his daughters only a life estate, and neither should have married, then the testator would have died intestate of the remainder of the \$80,000 so bequeathed for life to his daughters; and this result would have been inconsistent with the legal presumption that the testator intended to dispose of the sum absolutely; and the will must manifest a clear intention that the daughters should have only a life estate, before the court would declare that the testator had only disposed of a life interest in the legacy, and had died intestate as to the remainder.

And, as to personal property, it is held that a gift of the produce of a fund is a gift of the fund itself, unless there

be words of qualification restraining the extent and duration of the interest. And a bequest of personalty, without words of limitation or perpetuity, passes an absolute estate in the thing bequeathed, unless the contrary intention is plainly expressed or necessarily implied. (*Adamson v. Armitage*, 19 Ves. 416.)

There are in this will several bequests, which, it is conceded, give absolute interests, to which no words of limitation are annexed. For example, the testator gives and bequeaths all his slaves, who were tradesmen and mechanics of every description, such as smiths, carpenters, joiners, wheelwrights, ship carpenters, masons, shoemakers, etc., to be equally divided among his sons, and all the plate which belongs to the house in Washington wherein he resided, is directed to be equally divided, after his wife's death, among all the sons; and he also directs that all his stock of liquors and spirits on hand at his death should in the same manner be equally divided among all his sons; and these bequests, of course, passed absolute estates in the personalty so bequeathed without any words of limitation.

It is perfectly plain that this will was skilfully and artificially drawn. It is apparent from many items that the testator knew how to frame a devise or bequest for life in apt words; thus, in proper terms, it gives to his wife an estate for life in what is given to her; the charge upon the estates of several of his sons, in favor of one of his nieces, is properly limited to her life only; and so in other instances; all intimating clearly that he knew how to use words properly when he desired to create a life estate. And this circumstance is persuasive to suggest that he would have used similar plain words to limit the interest of his daughters in the fund, for life, if such had been his purpose.

The testator provided most munificently for his sons and grandson. His will enumerates upwards of thirty plantations, which are devised to them without exception. The bequests for the daughters are insignificant in comparison, and it would enhance the hardship, if the court

should be compelled to cut down the life estates, the slender portions which from his abundance he doled out to his daughters.

Omitting the provision as to marriage from the clause under consideration, there remains not one word to limit the power of disposition on the part of the daughters, or to combat the idea that the testator contemplated the vesting of the property in their personal representatives in case of their intestacy, or their power to bequeath their shares by last will. The language preceding the words "and from and after the intermarriage of any of them," etc., constitutes an ample gift of an absolute estate in the several sums of \$20,000 apiece to each daughter, although it declared that the money should be invested in United States bank stock or government securities, and be held in trust "for my said daughters respectively." Those words as fully confer an absolute estate in the sums designated as the bequests before referred to do in the plate and the wines bequeathed by the testator.

The bequest is first, directly to the daughters, of "\$20,000 apiece," to be invested in stocks, which he directs that his executors shall hold in trust for his said daughters respectively; applying "the dividends, interest or profits thereof to the benefit and use of the said daughters" severally and respectively, "as the said dividends, etc., shall accrue."

Thus far he had made a sufficient bequest of the absolute interest in the fund for the daughters, while single. We have no more reason to suppose that he considered his daughters incompetent, so long as they remained unmarried, to be trusted with \$20,000 apiece, than that his sons were incompetent to hold the great estates he had devised to them. They were equally his children and as much deserving of their father's bounty. But he naturally contemplated the probability of their marriage, and he knew that new relations would arise as to the management and ownership of the personalty, from the time they should marry.

From that moment, in the absence of express provisions to the contrary, the legacies would devolve upon their husbands, who might waste it and leave their wives penniless; hence, as a prudent father, he proceeded to impose such limitations upon the gift as should serve to protect it from this risk. The management was first committed to trustees; and this provision would have served as a sufficient safeguard against unwise investments by an unmarried daughter. But the solemnization of a marriage would create new difficulties which it was the sole purpose of the latter part of the clause to deal with; and the testator therefore added the words "and from and after the intermarriage of either of them," etc., to provide for this new condition of things.

That these added words were only intended to apply to the daughters after their respective marriages seems plain to us.

If none of the daughters should marry, it is self-evident that the added words could never possibly apply. Everything in the added sentences is predicated only on the marriage of either of the daughters, who in that event only is to be affected by the new provision, since the provision as to husbands and children could have no application to her until marriage. If the entire clause had been four times expressed in the will, each repetition referring to only one daughter separately, how could the added words declaring what should happen from and after the marriage of Virginia by possibility apply if Virginia should not marry at all?

It may well be, as was argued in behalf of the appellants, that an unmarried daughter could not have disposed of her legacy at her pleasure during her life; because if she had applied to the trustees to transfer the property, they would have urged the possibility of her marriage and the consequent coming into force upon that event of the provisions contained in the added words. But this possibility could not interfere with her power of disposal by will, since such disposition could only operate in favor of

her legatee after the possibility of marriage had disappeared, namely, after her death.

The cases cited by the appellants' counsel in his careful brief were decided upon the particular phraseology of the will there under examination; and they afford no certain guide where the words are as different as they are in those cases from those before us.

No decision cited comes as near to the present case as that of *Gulick v. Gulick* (27 N. J. Eq. 498), which is singularly like the present case. The fifth section of the will there considered reads as follows:

"I give and bequeath to my daughter, Abby Maria, the sum of \$10,000, to be placed out at interest, on bond and mortgage, so soon as my estate can be collected without sacrifice; the bonds and mortgages to be taken in the names of my executors or the survivor of them, in trust for my said daughter, Abby Maria, and the interest to be paid annually to her by my said executors or the survivor of them, and for her sole and separate use, and in nowise liable for the debts or subject to the control of any man she may marry.

"Should she marry and have a child or children, then after her death I give the said \$10,000 to such child or children."

The daughter died, never having married, and her personal representative claimed the fund. It was decided that the daughter died seized of an absolute estate against the contention that she was only entitled to a life estate. The court says:

"The testator, it is perceived, first provides for a gift of the fund itself and then the method of its enjoyment by the legatee. The last is equivalent to a gift of the interest of the fund. It is perceived, also, that until we meet the words 'should she marry and have a child,' etc., there is no limitation, express or implied, of the time of enjoyment of this interest. The rule is well established that a bequest of the income of personalty without limit as to time is equivalent to a gift of the property. And the rule applies

whether given directly or through the intervention of trustees. This absolute bequest was subject to the concluding clause of the section, 'should she marry and have a child or children, then, after her death, I give the said \$10,000 to such child or children.' The legatee never married. The event, upon the happening of which the interest was limited over, never occurred. The rule, therefore, governs that where an absolute gift is made in the first instance, followed by a limitation over on the death of the first taker, the absolute gift is not defeated unless the gift over takes effect.

"Construing this section as an absolute bequest, limited over upon the happening of an event which has failed, the executor of Abby Maria is entitled to the fund."

This reasoning of the court is very applicable to the case at bar; and we conceive that under the proper construction of this clause, Virginia Tayloe died seized of an absolute estate in the legacy of \$20,000, which she was competent to dispose of by her last will.

Being of the opinion that the decree below was correct, it is accordingly affirmed.

See, also, *Mickley's Appeal*, 1 Am. Prob. Rep. 615; *Vanderzee v. Slingerland*, 5 Id. 61; *Morford v. Dieffenbacker*, 5 Id. 135; *Weatherhead v. Stoddard*, 5 Id. 284.

COVERT vs. SEBERN.

[73 Iowa, 564.]

MISNOMER.—PAROLE EVIDENCE TO EXPLAIN.—REPUGNANCY.— JURISDICTION OF COURTS OF PROBATE.

The parole evidence of the scrivener is admissible to show that the plaintiff was the person designated as devisee by the testatrix and that the misnomer arose through the scrivener's mistake as to the devisee's initials.

The last of two clauses irreconcilably repugnant, is to be enforced as the latest expression of the intention of the testatrix.

APPEAL from a decree of Pottawattamie Circuit Court.

Clinton N. Powell, for the plaintiff.

Deemer & Junkin and *Shaw & Kuehnle*, for the defendants.

BECK, J. I. The following is a copy of the will involved in this case: "First. I give and bequeath to my step-son, H. S. Covert, all my right, title and interest in and to lots 1 and 2, in block 9, with all the improvements thereon in 'Meredith's addition' to the town of Avoca, Iowa. Second. After all my funeral expenses are paid, I give and bequeath to my niece, Amanda McClew, of Carroll county, Iowa, the sum of one hundred and fifty dollars. Third. I give and bequeath unto Leah Christiana Smock, of Benton county, in the state of Iowa, the sum of one hundred and fifty dollars. Fourth. The balance, residue and remainder I give and bequeath to my brothers and sisters, the same to be equally divided by and between them, Mrs. L. J. Sebern, of Crawford county, Iowa, A. V. Vanice, John N. Vanice and Elizabeth Williams, the three latter of Benton county, in the State of Iowa, except my beds and bed-clothing, and this I give and bequeath to my two dearly beloved sisters, and ask them to divide them satisfactorily by and between themselves. Fifth. All my household furniture, except the said beds and bed-clothing, of which I die seized I give and bequeath unto my step-son, H. S. Covert. Lastly. I give and bequeath to my step-son, H. S. Covert, all the remainder and residue of my property, be it real or personal, of what character or kind whatsoever. And I hereby appoint J. G. Tipton my executor of this my last will and testament, revoking all others; he being a neighbor of mine, and a resident of the town of Avoca, in the county of Pottawattamie, and State of Iowa."

The plaintiff, it is shown without dispute, was one of

four step-sons of the testatrix. His real first name was John Harvey, and he was usually called by the testatrix "Harvey." No one of the step-sons was named or known by the name of "H. S.," nor were these letters the initials of the names of any one of them. The scrivener who wrote the will was permitted, against defendant's objection, to testify, in effect, that the testatrix, in instructing him to prepare the will, and the items thereof devising and bequeathing the property specified in the first, fifth and last items of the will, designated the beneficiary in these items as her step-son "Harvey," and directed him to prepare the will devising and bequeathing the property specified in these items to her step-son Harvey; that he supposed and believed that the initials of plaintiff's first name were "H. S.," and, so believing, wrote these initials to designate him, and that he knew the plaintiff by the name of "Harvey." This witness testified that he was acquainted with plaintiff, and that he knows of no person whose name is *H. S. Covert*. It is not shown that any person bears that name.

II. Two questions arise in this case which require determination in order to reach a decision therein, viz.: (1) Is it competent, by parol evidence, to apply the items of the will wherein *H. S. Covert* is the beneficiary to the plaintiff, showing thereby that the testatrix intended to will the property to him? (2) Is plaintiff the sole residuary legatee, being last-named as such, after a prior item names the defendants as the residuary legatees? In our opinion as to the name of the beneficiary in the items designated "first," "fifth," and "lastly," there is a latent ambiguity. On the face of the will there appears no uncertainty or ambiguity; but, as the truth is that there is no living person of the name of *H. S. Covert*, there arises, upon that fact being made to appear, a latent ambiguity. This ambiguity must be explained, otherwise the bequests made in these items fail, and the testatrix's intentions will be defeated. But the law will uphold her intentions when they may be made sufficiently certain. The law will not, by holding the items void, declare that the testatrix had no in-

tentions, but will seek to discover her true intentions by evidence which will with certainty identify the beneficiary, and connect him with the will. The law will thus find and produce the person upon whom the testatrix intended to bestow her bounty.

It will be remembered that the intention of a testator is the polar star guiding courts in the interpretation of wills, and that it may be sought for by oral evidence identifying the beneficiaries named in the will, and, when necessary, the property bequeathed. In this case, the parol evidence certainly identifies the plaintiff as the legatee named in the first and fifth items of the will, and the residuary legatee named in the last. He is described in these items as the step-son of the testatrix. She had no step-son bearing the name written to designate plaintiff. She designated him to the scrivener as "Harvey," a part of his real name by which she usually called him, and by which he was known. It seems to us that this evidence discloses with absolute certainty the intention of the testatrix, which must be enforced by the law. We have no doubt that the parol evidence above referred to, under a familiar rule of the law, is competent. In support of these views see the following authorities: (*Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Hawkins v. Garland's Adm'r*, 76 Va. 149; 3 Amer. Prob. Rep. 550; *Mann v. Executors of Mann*, 1 Johns. Ch. 231; *Morse v. Stearns*, 131 Mass. 389; 2 Amer. Prob. Rep. 51; *Morgan v. Burrows*, 45 Wis. 211; *Case v. Young*, 3 Minn. 209 [Gil. 140]; 1 Jarm. Wills [5th Ed.], 429 *et seq.* and notes; *Lorieux v. Keller*, 5 Iowa, 196.)

Palmer v. Albee (50 Iowa, 429), cited by defendant's counsel, involved the interpretation of a contract. We understand the rules pertaining to ambiguities differ as to wills and contracts. This decision is not, therefore, applicable to the case before us. *Dunham v. Averile* (45 Conn. 61), cited by same counsel, is a case where it was sought to contradict the express language of a will by directing the bequest to a person other than the one named as the beneficiary. In the case before us, by a latent ambiguity, the beneficiary

does not certainly appear, but is discovered by competent parole evidence. The cases are wholly unlike.

III. It will be observed that there is an irreconcilable repugnancy between the fourth and last items of the will. The fourth declares that the defendants shall be the residuary legatees. The last, in express and direct language, makes plaintiff the residuary legatee. It is plain that these provisions are incapable of being reconciled; if one stands, the other must fall. The law provides a plain rule to be followed in such cases, which holds that the last clause, being the last expression of the testatrix's intention, must be enforced, and the other be disregarded. (1 Redf. Wills, 451; 1 Jarm. Wills, 472; *Armstrong v. Crapo*, 72 Iowa, 604; *Heidlebaugh v. Wagner*, Id. 601; *Johnson v. Mayne*, 4 Iowa, 180.) This familiar rule requires us to hold that plaintiff is the sole residuary legatee, and that the defendants can take no part of the residue of the estate under the fourth item of the will, which, so far as it provides that they shall be the residuary legatees, is superceded by the last item.

IV. Counsel for defendants argue that the language of the fourth item is such that it disposes of the promissory notes of which the testatrix died possessed, and which constitutes, with the personalty specifically bequeathed and the real estate mentioned in the first item, the whole of the estate. The inventory filed by the executor probably shows the fact that no other property of the testatrix was found by the executor,—certainly no other is reported by him. But there is not one word of evidence showing the quantity or character of the testatrix's property at the time the will was made, which was more than three years before the will was admitted to probate and the inventory filed. The date of the testatrix's death is not shown by the record, nor do the dates of the promissory notes appear therein. We cannot presume that the property of the testator was the same when the will was made as at her death. The very foundation of counsel's argument is overthrown by these considerations.

But, did the facts as assumed by counsel appear, we do

not think they would support his conclusion. The second and third items bequeath money; the fourth declares that "the balance, residue and remainder" shall go to defendants. The remainder of what? The language of the items means the balance of the money of the estate, or the balance of money realized from the assets of the estate, or the remainder of the property of the estate which shall go to defendants. Whichever of these meanings be given to it, the provision is wholly and plainly repugnant to the last item under which plaintiff claims.

V. Counsel for defendants insist that the Probate Court had no jurisdiction in the case, for the reason that it is brought for the interpretation of the will, of which the Court of Chancery has exclusive jurisdiction. The action is brought to require the executor to distribute the property of the estate as provided for by the terms of the will. The statute clearly gives authority to the Probate Court to direct the payment of legacies, and to enforce its order made in that regard. (Code, §§ 2429, 2430, 2433, 2435.)

In order to determine the questions presented by plaintiff's petition, it was necessary for the Probate Court to interpret the will. Indeed, no order affecting the rights of the legatees, based upon the will, can be made by the Probate Court unless the will be interpreted so as to discover what these rights are. If the court may require, by order, the executor to distribute the property, or the money realized therefrom, to the legatees, the exercise of this power involves the interpretation of the will. Indeed, the authority to interpret the will is possessed by all courts called upon to enforce rights under it. While the Court of Chancery has jurisdiction of cases brought for the sole purpose of construing or interpreting wills, it is not so far exclusive as to forbid other courts, in which are cases involving rights under wills, to interpret their language. After Chancery, in a proper action, has put an interpretation on a will, other courts will follow it as between parties bound by the decree in the action.

VI. The Circuit Court held (1) that it was competent

for plaintiff to show that he was the beneficiary intended by the testatrix when she used the name H. S. Covert; but (2) that defendants and plaintiff all together should be regarded as the residuary legatees, and the remainder of the estate should be equally divided between them. The plaintiff appeals from the decision last named, and the defendants from both.

The first decision, upon defendants' appeal, is affirmed. The second decision, on plaintiff's appeal, is reversed. The case will be remanded to the court below for further proceedings in harmony with this opinion.

Misnomer.—The legatee is to be so designated as to be distinguished from every other person; otherwise the heir at law will take. 1 Jarman on Wills, Com. *330, and cases cited; Bradshaw v. Bradshaw, 2 Younge & C. 72; Smith v. Smith, 4 Paige, 271; Atty. General v. Sibthorpe, 2 Russ. & M. 107; South New Market Methodist Seminary v. Peaslee, 15 N. H. 317; Wood v. Moore, 4 Sandf. 537; Winkley v. Kaime, 33 N. H. 368; Douglas v. Blackford, 7 Md. 8; Minot v. Boston Asylum & Farm for Indigent Boys, 7 Met. 216; 2 Williams on Executors, 1035, and cases cited; Kelley v. Kelley, 25 Pa. 460; Wootton v. Redd, 12 Gratt. 196; Thomas v. Thomas, 6 T. R. 671.

In *Adams v. Jones*, 9 Hare, 484, the question was whether, under this bequest, "I give to Clara Hannah Adams, the wife of Thomas Adams," etc., the wife of Thomas Adams, whose name was Hannah, or his daughter, whose name was Clara Hannah, was intended, or whether the gift was void for uncertainty. Held a good gift to the wife, the Vice Chancellor saying: "A disposition cannot be avoided for uncertainty, if the court can arrive at a reasonable degree of certainty."

In *Queen's College v. Sutton*, 13 Sim. 441, a legacy was given to the "Provost & Fellows of Queen's College." The proper name of the corporation was the Provost & Scholars. Held that the Provost Scholars were entitled, the former name being used in "common parlance."

In *Wilson v. Squire*, 1 Younge & C. 654, a legacy was given to the "London Orphan Asylum in the City Road." No institution precisely answered this description. Held that the Orphan Working School in the City Road was entitled.

In *General Lying in Hospital v. Knight*, 11 Eng. L. & Eq. 191, William Shadrack, by will dated January 31, 1850, gave legacies of stock to several charities, and among them said: "I give and bequeath unto the

Westminster Asylum for Pregnant Women the sum of £500 from the 3 per cent. reduced annuities." Testator died January 31, 1850. Claim was filed by the president, etc., of the General Lying in Hospital of Westminster against the executors, stating that they were a body corporate, etc. After argument the Master of the Rolls decided: "As there was no similar charity in Westminster, and the plaintiff having at one time borne a name something similar, I think, without farther arguing, I may declare that the General Lying in Hospital was intended by the testator, and make a decree for the legacy and costs."

In *Minot v. Boston Asylum & Farm for Indigent Boys*, 7 Met. 416, a testator gave a legacy to the "Boy's Asylum & Farm School," there being no institution or association of any similar name except the Boston Asylum & Farm School for Indigent Boys. Held that this corporation was entitled to the legacy. The general rule is, that where either a corporation or a natural person is so identified by the name and description in the will, as applied to the facts and circumstances, as to distinguish such person or corporation from all others, such person or corporation shall take the bequest in the same manner as if no such discrepancy had appeared. Where the name and description in a legacy, when applied to the facts, lead to a reasonable belief that they apply to some one person, and there is no other person to whom they can with any probability apply, then much slighter evidence will be sufficient to prove that that person was intended.

In *Tucker v. Seaman's Aid Society*, 7 Met. 188, the testator had left, in consequence of mistaken information, a legacy to the Seaman's Aid Society of Boston. It was claimed by the Seaman's Friend Society of New York and Boston. Shaw, Ch. J., in a very learned opinion says: "The Seaman's Friend Society, either of New York or Boston, cannot take, because the name and description are not those by which they have ever acted or been known or designated; and because the Seaman's Aid Society is the one precisely named and described in the will. Had there been but one charitable society established for the relief and benefit of seamen, and that one the Seaman's Friend Society, the evidence to be derived from the facts and circumstances, combined with a name very near the one mentioned in the will, and a description indicating the purposes to which the gift was devoted, in the absence of any other claim, on the part of any similar society, would have been very strong, without direct proof of intention to show that the Seaman's Friend Society was intended; and if so, they would be entitled to take the legacy by the established rules of law." Again referring to this case in 7 Met. 419, Shaw, C. J., says: "So in the case of the Seaman's Aid Society, had there not been a corporation by the name of the Seaman's Aid Society, nor any other of a similar name or description, the Seaman's Friend Society would have been sufficiently identified and designated to enable them to take the bequest."

In *Button v. American Tract Society*, 23 Vt. 349, a devise to "the

American Home Mission Tract Society," was held a good devise to the American Tract Society, the court saying: "The description of the devise in the will contains all the words which constituted the name of tract society. It does, indeed, contain other terms, but those are not inapplicable to, but are descriptive of, the American Tract Society. The terms used by the testator are applicable to and will describe the American Tract Society, and there is no other society, that we are aware of, to which all the terms are applicable."

In *Brewster v. McCall*, 15 Conn. 276, 292, a bequest to "the Missionary Society of Foreign Missions" was held a good bequest to the American Board of Commissioners for Foreign Missions. The court says: "It is however insisted that in this case the evidence proves that there is no such corporation or society in existence as the Missionary Society of Foreign Missions, and therefore the devise is inoperative. If, indeed, there were no society in existence, either of this name or description, the devise would be void for want of any person to take under it. If, however, there is a corporation of either that name or description, and only one, we think there cannot be a doubt that it would take under this devise. Under the circumstances of this case, the devise must be deemed to be made to that society by description, and not by name."

In *McBride v. Elmer*, 2 Halst. 107, the devise was to "the Bridgeton Trustees for Free Schools." There were no such trustees, and the only free schools in Bridgeton were called public schools. Held a good devise to be executed, and trustees were appointed.

See, also, *Moreland v. Brady*, 1 Am. Prob. Rep. 441; *Griscom v. Evens*, Id. 130; *Burnet v. Burnet*, Id. 539; *Merrick v. Merrick*, 2 Id. 161; *Judy v. Gilbert*, Id. 89; *Morse v. Stearns*, Id. 51; *Hammond v. Hammond*, Id. 119; *Appel v. Byers*, 3 Id. 1; *Hawkins v. Garland*, Id. 550; *Fairfield v. Lawson*, 4 Id. 36; *Hinckley v. Thatcher*, Id. 488; *Gilmer v. Stone*, 5 Id. 68; *Webster v. Morris*, Id. 158.

CORRY vs. LAMB.

[45 Ohio St., 203.]

ELECTION.—DEVISE IN LIEU OF DOWER.

A widow electing to take the provision made for her in the will of her husband, will be barred of dower in land of which he was seized as an estate of inherit-

ance during coverture, and which was sold and conveyed on foreclosure of a mortgage executed by him in which she did not join, unless it plainly appears by the will that she should have such provision in addition to her dower.

RESERVED for the Supreme Court in the District Court of Hamilton County.

I. J. Miller and George B. Okey, for the plaintiff in error.

Simeon M. Johnson, for the defendant in error.

DICKMAN, J. In July, 1853, James A. Corry executed a mortgage of the land in which his widow, Catharine Corry, the plaintiff, claims dower, to one Adolphus H. Smith. In the mortgage, the grantor, for himself, his heirs and assigns, covenanted with the grantee, his heirs and assigns, that the title conveyed was free and unincumbered, and that he would warrant and defend the same against all claims whatsoever. In June, 1861, under proceedings of foreclosure by the mortgagee, the land was duly sold and conveyed to one John Bates, through whom the defendant Elizabeth Lamb traces her title, and through mesne conveyances holds the premises in fee-simple. As the plaintiff did not join in the mortgage, the proceedings upon it did not affect her dower interest in the land conveyed. When the right of dower has once attached, although it may possibly never become absolute, it cannot be defeated by any act of the husband in the nature of an alienation or charge. The widow cannot be deprived of it by the creditors of her husband, and when the husband obtains a loan upon a mortgage to which the wife is not a party, her dower is superior to the mortgagee's equity.

But the question to be determined is, whether the widow, having elected to take the provision made for her in the will of her husband, is entitled to dower in real estate of which he was seized as an estate of inheritance during coverture, and which he aliened by deed in his life-time, but in the execution of which deed she did not join. James A. Corry died in 1881, and the rights of his widow acquired under his will, so far as they are affected by statutory provisions, come under the operation of the Revised Statutes.

Section 5963 of the Revised Statutes provides: "If any provision be made for a widow, in the will of her husband, it shall be the duty of the probate judge, forthwith after the probate of such will, to issue a citation to said widow to appear and make her election, whether she will take such provision, or be endowed of the lands of her said husband and take her distributive share of his personal estate; and said election shall be made within one year from the date of the service of the citation aforesaid; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention that she should have such provision in addition to her dower and distributive share."

Section 5964 provides: . . . "On the application by her to take under the will, it shall be the duty of the court to explain to her the provisions of the will, her rights under it, and by law in the event of her refusal to take under the will; . . . and if the widow shall fail to make such election, she shall retain her dower, and such share of the personal estate of her husband as she would be entitled to by law in case her husband had died intestate, leaving children. If she elect to take under the will, she shall be barred of her dower and such share, and take under the will alone, unless as provided in the next preceding section."

At common law, where there was a provision in the will for the widow, the presumption was that the testator intended it to be in addition to dower, there being no express words putting the widow to her election, nor any incompatibility arising on the face of the will between the two claims. But under the statute, unless an intention to the contrary plainly appears by the will, the presumption is that the provision made for the widow in the will of her husband is in lieu of dower. "Under our statute the will is to be regarded as assuming to dispose of the dower estate, unless the contrary clearly appears." (*Huston v. Cone*, 24 Ohio St. 21.)

There is no language in the will indicating an intention of the testator that the plaintiff should have dower as well as the testamentary provision—no expression to over-

come the presumption that the provision is exclusive of dower. It is insisted, however, that while the widow's election to take under the will bars her of dower in testamentary property, it does not thus operate as to lands of which the husband was seized during coverture, which he had conveyed, but in the conveyance of which she did not join. We are satisfied, from an examination of the statutes, that the bar to dower by reason of the widow's election to accept under the will, extends to all real estate of which the husband may have been seized as an estate of inheritance at any time during the coverture, and in which the wife's dower has not been extinguished by the statutory method.

The plaintiff's rights under the will cannot be mistaken. And if she had declined the testamentary provision, her rights as a widow would be placed equally beyond dispute by section 4188 of the Revised Statutes, which endows the widow of "one-third part of all the lands, tenements and real estate, of which her husband was seized as an estate of inheritance at any time during coverture." Under section 5963, it is left to the widow's option either to take such provision as is made for her in the will of her husband, "or be endowed of the lands of her husband," that is, take her dower as secured to her by section 4188 with all that the word imports. If she elects to take under the will, by section 5964, "she shall be barred of her dower." The term "dower" is not of obscure and uncertain meaning. It is unambiguous, and has a fixed, definite and legal signification. It is a right that attaches not merely to the lands of which the husband dies seized, but to all the lands whereof he was seized, either in deed or in law, at any time during the coverture. (Litt, section 36; 4 Kent's Com. 35.) If to be endowed of the lands of her husband, or have dower in his lands, applies to all lands whereof the husband was seized as an estate of inheritance at any time during the intermarriage, the language of section 5964, "she shall be barred of her dower" upon her electing to take under the will, should have a no less extended application, and cannot be confined to property devised in the will. The meaning of

dower is not so elastic as to embrace one thing when the widow would be endowed according to law, and another thing when she is to be barred of dower by accepting the provisions of the will.

The statute contemplates an alternative, either that the widow shall *take under the will alone*, unless a contrary intention plainly appears thereby, or retain the provisions *made for her by law*; but she cannot be entitled to both. If she accepts the testamentary provision made for her, she thereby relinquishes the provisions which the law makes for her, and which includes dower in its legal sense. Thus, the statute, when the widow applies to take under the will, makes it the duty of the court to explain to her her "rights by law," in the event of her refusal to take under the will. Again, if she is unable to appear in court on account of ill health, or is a non-resident of the county, a suitable person may be authorized to take her election to accept the provisions of the will "in lieu of the provisions made for her by law," and it becomes incumbent upon such person to explain to her her right under the will and "by law." And so, if the widow is not able to make an election by reason of insanity or imbecility of mind, it devolves upon the Probate Court to make an election for her, after ascertaining and becoming satisfied, by the method prescribed in the statute, that the testamentary provision for the widow "is more valuable and better for her than the provision by law." It is manifest that if in the alternative she takes under the will alone, she cannot assert a valid claim upon property which is not embraced in the will, and which could not be the subject of testamentary disposition.

The force and intent of the foregoing enactments, and others of like purport and effect, as operating to bar the widow's dower in lands aliened by the husband during intermarriage, have been illustrated by numerous authorities in other States, in the construction of their statutes in relation to dower and wills, and of devises for the wife's benefit. In *Steele v. Fisher* (1 Edw. Ch. 435), a husband conveyed real estate in fee, without his wife's joining. After-

ward, by will, he bequeathed to the wife a third of the remainder of his real and personal estate, as and for her right of dower, during her life. She accepted it, and it was held that it was a relinquishment of her claim for dower out of the realty which had been conveyed by the husband alone, as well as out of the lands whereof the husband was seized at the time of making his will. It was urged that the provision which the widow accepted, was only a substitute for dower in the estate which the husband had at the time of making the will, and had no bearing upon the right of dower in property previously conveyed. But, said the Vice Chancellor, "No case is to be found in the books where the distinction here taken has prevailed; and it is difficult to perceive upon what foundation it can be supported, unless there is something in the bequest to show it was intended as a substitute for dower only in some particular parts or portions of the real estate whereof the husband had been seized, and not in the whole to which the right would ordinarily attach."

Palmer v. Voorhis (35 Barb. 479), is a case in which the testator by his will made a provision for the benefit of his wife, which was to be a charge upon his real estate, and declared it should be received by her in lieu of dower and thirds of his real and personal estate. But her dower was held to embrace not only an estate in the lands whereof her husband died seized of an estate of inheritance, but also in all lands of which he was so seized during coverture, notwithstanding he may have parted with his interest by a deed of conveyance to others.

The statute of distributions of South Carolina, passed in 1791, provided: "That in all cases where provision is made by this act for the widow of a person dying intestate, the same shall, if accepted, be in lieu and bar of dower." In construing this language of the statute, Whitner, J., in *Evans v. Pierson* (9 Rich. [S. C.] 9), says: "It is suggested that the clause in review has reference only to the lands of which the husband dies seized. . . . Such has not been the course of judicial interpretation heretofore. The right

of dower attaches to all the lands and tenements whereof the husband was seized during the coverture. Hence, it has been held, that when the term is used in the act, it embraces the whole right, and consequently where a widow accepts a provision under the act, it is in lieu of dower entirely, whether in lands aliened, or in those of which the husband continued seized, the design of the statute being clearly to give the right of election between dower at common law and the provision made by the act." (See, also, *Avant v. Robertson*, 2 McMull. [S. C.] 215.)

In *Haynie v. Dickens* (68 Ill. 267), the widow claimed dower in the lands of which her husband was seized during coverture, but which were sold during his life-time on execution. The plaintiff had never released her dower, but the defense relied on was, that her right was barred by a provision made for her by her husband in his will. By the 10th section of the dower act of Illinois, it was provided: "Every devise of land or any estate therein by will shall bar her dower in lands unless otherwise expressed in the will, but she may elect whether she will take such devise, or whether she will renounce the benefit of such devise, and take her dower in the lands of her husband." It was urged that this section of the statute could have no application to the case at bar, for the reason that the land in which dower was claimed had been sold on execution, and the testator at the time of his death had no interest in it. The court said, "We do not think this view of the law can be sustained. It was doubtless the intention of the legislature to provide, that a devise of land or any estate therein should bar the widow's dower in all lands of which her husband was seized during coverture, whether he had alienated the same in his life-time or not."

The legislation of Massachusetts bears a marked resemblance to that of Ohio, in regard to the rights of a widow claiming to be endowed in the lands of her husband, though a provision has been made for her in his will. Section 24, of the Massachusetts statute of wills (Genl. Stat. 1860, ch. 92), is *in pari materia* with sections 5963 and 5964, *supra*,

and reads as follows : "When a man dies having lawfully disposed of his estate by will, and leaving a widow, she may file in the probate office in writing her waiver of the provisions made for her in the will ; and shall in such case be entitled to such portion of his real and personal estate as she would have been entitled to if her husband had died intestate. If she makes no such waiver, she shall *not be endowed of his lands*, unless it plainly appears by the will to have been the intention of the testator that she should have such provisions in addition to her dower." In *Buffington v. Fall River National Bank* (113 Mass. 246), the demandant of dower contended that the land having been aliened in the life-time of the testator, was no part of "his lands," and, therefore, not within the provisions of the statute above quoted. "But," said the court, "the claim of dower out of lands aliened, without release by the wife, stands upon the same right as that of dower in lands remaining a part of the estate devised.

. . . The same reason exists for applying the bar in one case as in the other. There is nothing in the phraseology of the statute to limit its application to lands held at the decease of the testator. The expression 'endowed of his lands,' and 'dower in the lands of her husband,' when used affirmatively, embrace, without question, dower in all lands of which the husband is seized at any time during coverture."

At variance, apparently, with the decisions which we have herein cited, is the case of *Borland v. Nichols* (12 Pa. St. 38), in which it was held that the widow's acceptance of a devise to her did not, under section 10 of the intestate law of 1797, bar her of her dower in land which her husband conveyed in his life-time, and in the conveyance of which she did not join ; and the fact that the husband conveyed with general warranty, will not restrain the operation of the statute. The court, in commenting upon the act, observed, that the simple absence of every direct expression indicative of a design to bring lands aliened within the purview of the enactment, ought in itself to be accepted as sufficiently proving that no such design was entertained. It is not un-

reasonable that the court might have reached a different conclusion, and have found an equivalent to such "direct expression" had the Ohio enactments been under consideration. The requirement of section 5964, that the court should explain to the widow her rights under the will and by law, could not be complied with without making known to her her statutory right of dower comprehending aliened as well as other lands. And, as by electing to take under the will she would be barred of her dower, and compelled to take under the will alone, it would at once be obvious that she could not in such case be dowable in lands that had been aliened, and were therefore beyond the scope of the will.

It has been suggested that the covenants contained in the mortgage to Adolphus H. Smith run with the land, and that an action might be maintained thereon by any grantee in possession at the time of a breach by reason of assigning dower to the widow. A debt or claim, it is said, would thus be created against the estate of the testator or mortgagor, and the several devises and bequests in the will, other than those of the widow, would be lessened or defeated by her claim of dower in aliened lands, for that, in taking under the will in lieu of dower, she becomes a purchaser for a valuable consideration, and holds the property thus acquired free from the claims of the creditors of the estate. The decision of the case at bar does not require the determination of questions to which such considerations might give rise. It is enough to refer to the approved doctrine, that if the testator has made such a disposition of his real estate that the assertion by the widow of her right to dower would prevent that disposition taking effect according to his intention, then she must elect to abandon either her dower or the benefit given her by the will. (*Dixon v. McCue*, 14 Gratt. 549.)

In the view we have thus taken of the case, the plaintiff is not entitled to dower in the lands sold and conveyed under judicial proceedings in the foreclosure suit, and there should be judgment for the defendant.

Judgment accordingly.

See, also, *Stewart v. Stewart*, 1 Am. Prob. Rep. 168; *Milliken v. Welliver*, 2 Id. 417; *Isler v. Isler*, 3 Id. 19; *Penn v. Guggenheimer*, Id. 487; *Matter of Benson*, 4 Id. 7; *Van Steenwyck v. Washburn*, Id. 337; *Security Company v. Bryant*, Id. 552; *Konvalinka v. Schlegel*, 5 Id. 310; *Russell v. Minton*, Id. 125; *Estate of Gotzian*, Id. 418.

BUNCH vs. NICKS.

[50 Arkansas, 367.]

A DEED MAKING POSTHUMOUS GRANT IS NOT A WILL.

An instrument in the common form of a deed with covenant of warranty, executed, delivered and acknowledged as a deed, is not a will although it be expressed to take effect at the grantor's death; nor is a conveyance of a freehold estate, with possession merely postponed until the grantor's death, invalid as a grant *in futuro*.

APPEAL from a decree of the Arkansas Circuit Court in Chancery.

Hemingway & Austin, for the appellants.

Gibson & Holt, for the appellees.

BATTLE, J. Quinton D. Nicks, being the father of six children, two sons and four daughters, conveyed his property, consisting of three tracts of land and personal property, by three several deeds, to three of his children, a son and two daughters. The father having died, the daughters and the children of the son who received nothing by the deeds, brought this action to set aside the conveyances and for partition. They allege in their complaint that the father was incompetent to convey his property at the time he undertook to do so, and that the deeds were procured by

fraud and undue influence. But this is denied by defendants in their answers. Upon the final hearing the court below decreed that the deeds should be set aside and the property therein described be divided among the heirs of Nicks; and the defendants appealed.

The deeds were executed on the same day, and, except as to the names of the grantees and description of the property conveyed and so much of one as conveyed the personal property, are of the same tenor and effect. The deed to the son is in the following words :

“This deed of conveyance, made and executed at Swan Lake, in the county of Arkansas, and State of Arkansas, on this the 3d day of March, A. D., 1883, by and between Q. D. Nicks, senior, party of the first part, and Q. D. Nicks, junior, party of the second part, witnesseth, that for and in consideration of the sum of one dollar, this day in hand paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, and in consideration of the love and affection that the first party bears to the second party, he hath bargained, sold, and conveyed, and by these presents does grant, bargain, sell and convey unto said Q. D. Nicks, junior, and to his children (and the same shall not be sold or alienated until the youngest child shall arrive at the age of twenty-one years, and the deed shall go into full force and effect at my death) the following described lands, to wit: The south half of the north half of the northwest quarter of section twenty, in township six, south of range six west, being a fractional part of forty acres, the boundaries hereafter to be designated by stakes or iron stobs, together with all the improvements and appurtenances thereon or in anywise belonging thereto.

“To have and to hold the within granted lands and premises unto said party of the second part, his heirs and assigns forever; and the party of the first part will, and his heirs and assigns shall, forever warrant and defend the title to the same unto said party of the second part, his heirs and assigns, against all lawful claims whatsoever.

"Witness my hand and seal the time and place before written,
Q. D. NICKS. [Seal.]"

To the deed to one of the daughters was added the following sentence: "And in consideration of the said second party's taking care of her mother and myself during our lifetime, and paying all of my funeral expenses, I do bargain and sell unto the said Martha Bunch, and by these presents do bargain, sell, and convey at my death all the personal property that I may be possessed of, to have and to hold forever." All the deeds were properly acknowledged and recorded.

It is contended that these deeds are void upon their faces. The objection is, they purport to convey freehold estates to commence at the death of the grantor. Are they void for the reason stated?

It was a principle of the feudal law of England that "an estate of freehold must be created to commence immediately." "For," says Blackstone, "it is an ancient rule of the common law, that an estate of freehold cannot be created to commence in future; but it ought to take effect presently, either in possession or remainder; because at common law no freehold in lands could pass without livery of seisin, which must operate either immediately or not at all. It would, therefore, be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession."

Prior to the reign of Henry VIII, real estate could be conveyed to one person in trust or for the use of another, and equity would enforce the use. In this way the title could be held by one while the use and profits of the land could be enjoyed by another free from feudal responsibilities. The use was a mere right in equity and did not come within the technical rules of the common law which governed the alienation of real estate. While "a fee could not be mounted upon a fee," at common law, "or an estate made to shift from one person to another by matter *ex post facto*; and a freehold could not be made to commence *in futuro*, nor an estate spring up at a future period independ-

ently of any other ; and a power could not be reserved to limit the estate, or create charges on it in derogation of the original feoffment,"—"a use might be raised after a limitation in fee, or it might be created *in futuro*, without any preceding limitation ; or the order of priority might be changed by shifting uses or by powers ; or a power of revocation might be reserved to the grantor, or to a stranger, to recall and change the uses." The facility with which they could be created led to their application to a variety of purposes in the business of civil life ; and they were often perverted to mischievous ends. Lord Bacon complained that they were "turned to deceive many of their just and reasonable rights." To prevent the abuses and frauds practiced through them the statute of 27 Henry VIII, c. 10, commonly called the statute of uses, was passed, by which it was enacted that the legal estate or seisin shall be in them that have the use, "*in such quality, manner, form and condition, as they before had in the use,*" and thereby united the use and legal title, and changed the use from an equitable to a legal interest, and gave to the legal interest thereby created the qualities of the use, and declared that the *cestui qui use* held the same in the same manner, form, and condition as he before held the use ; so that while freehold estates to commence *in futuro* could not be conveyed at common law, such conveyances can be made under the statute of uses. (2 Blackstone, p. 327 ; 4 Kent's Com. pp. 290-298.)

The result of the statute of uses was, several new modes of conveying legal estates, wholly unknown to the common law, came into use, among them covenants to stand seized to uses, and bargain and sale. In the first mentioned conveyance a man seized of lands, covenants that he will stand seized to the use of the covenantee for life, in tail, or in fee. "Here," says Blackstone, "the statute executes at once the estate ; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession, without ever seeing it, by a kind of parliamentary magic." In the bargain and sale "the bargainer, for some

pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain a trustee for, or seized to the use of, the bargainee; and then the statute of uses completes the purchase; or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession." By both modes an estate of freehold to commence *in futuro* can be created under the statute of uses. (2 Blackstone Com. p. 338.)

In *Roe v. Franmar* (Willes, 682), "A., in consideration of natural love and of £100, by deed of lease and release, granted, released and confirmed certain premises, *after his own death*, to his brother B., in tail, remainder to C., the son of another brother of A., in fee; and he covenanted and granted that the premises should, after his death, be held by B., and the heirs of his body, or by C. and his heirs according to the true intent of the deed. It was held that the deed could not operate as a release, because it attempted to convey a freehold *in futuro*, but that it was good as a covenant to stand seized."

In *Wyman v. Brown* (50 Me. 139), H. B., in consideration of \$1,000, by deed, containing the following words: "This deed or conveyance *not to take effect during my lifetime*, and to take effect and be in force from and after my decease; and the said Hannah is to have quiet possession and the entire income of the premises until her decease;" conveyed certain lands to N. It was held the deed was sufficient, under the statute of uses, to convey an estate of freehold to commence at the death of H. B. Mr. Justice Walton, speaking for the court in that case, said: "We entertain no doubt that, by deeds of bargain and sale, deriving their validity from the statute of uses, freeholds may be conveyed to commence *in futuro*. It will be seen that the law is so held in England, and by an overwhelming weight of authority in this country."

And so in *Gullett v. Lamberton* (6 Ark. 109), in a conveyance of a slave to a daughter, the grantor reserved to himself the use and possession of the slave during his natural

life or pleasure. This court, after holding that slaves and real estate stood upon the same footing as to limitations and reservations contained in conveyances, held that the conveyance was valid and sufficient to vest in the daughter a future estate in the slave.

There are numerous cases to the same effect as those already cited. (*Williams v. Tolbert*, 66 Ga. 127; *Doonn v. Smith*, 52 Me. 141; *Rogers v. The Eagle Fire Co.* 9 Wend. 611, and cases cited.)

We think an estate of freehold to commence *in futuro*, can also be conveyed under our statutes, independently of the statute of uses. Under our laws real property stands upon ground different in many respects from that upon which it stood at common law. Anciently it was held of some superior lord "by and in consideration of certain services to be rendered to the lord by the tenant." In most of instances the services to be rendered were military. Out of this fact grew the necessity of livery of seisin in order to create an estate of freehold, and the rule that "there should always be a known owner of every freehold estate, and that the freehold should never, if possible, be in abeyance. This rule," it is said, "was established for two reasons. 1. That the superior lord might know on whom to call for the military services due from every freeholder, as otherwise the defense of the realm would be weakened. 2. That every stranger who claimed a right to any lands might know against whom to bring suit for the recovery of them; as no real action could be brought against any one but the actual tenant of the freehold." But under the laws of this State lands are held in *allodium*. They may be aliened and possession thereof transferred by deed without livery of seisin. "Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest in the same manner and with like effect as if he was in the actual possession thereof." "If any person," says the statute, "shall convey any real estate by deed, purporting to convey the same in fee simple absolute or any less estate, and shall not at the time of such

conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate after acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." Under the statutes referred to the mere technicalities of the common law were swept away; and the aid of the statute of uses is not necessary to annex the title to the use. "But the owner of real estate can convey such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrines which arose out of ancient feudal tenures, and all the restrictive effects which they had upon alienations." (Mansfield's Digest, secs. 639, 642, 644; *Ferguson v. Mason*, 60 Wis. 377; *Abbott v. Holway*, 72 Me. 298.)

In *Hynson v. Terry* (1 Ark. 83), and *Gullett v. Lamberton* (6 Ark. 109), this court held that real and personal property in this State, stand upon the same footing as to limitations and reservations contained in conveyances, and a sale may be made creating a future estate in personal property, with the right of possession in the vendor for life, or a shorter period, in the same manner and to the same effect as in real estate. Professor Gray, in his work on *The Rule Against Perpetuities*, says: "In North Carolina alone is the opposite doctrine held;" and that "outside of North Carolina the case of *Wilson v. Cockrill* (8 Mo. 1), is the only decision that an executory limitation of a chattel cannot be made by deed." (Gray's *Rule Against Perpetuities*, secs. 19-35, and cases cited; 1 Schouler on *Personal Property* [2d ed.], secs. 136, 149.)

But it is contended that the deeds in question are testamentary in their nature, and therefore void.

To determine the character of an instrument, as to its being a will or deed, it is necessary to ascertain the intention of the maker from the *whole* instrument, "read in the light of surrounding circumstances." If the intention at the time of the execution of the instrument was to convey

a present estate, though the possession be postponed until after his death, it is a deed; but if the intention was it should not convey any vested right or interest, but should be revocable during his life, it is a will. (*Jordan v. Jordan*, 65 Ala. 301; *Williamson v. Tolbert*, 66 Ga. 127.)

Are the instruments in question deeds or a will?

In *Shackelford v. Sebree* (86 Ill. 616), an instrument purporting to be a warranty deed, containing this clause: "This deed not to take effect until after my decease—not to be recorded until after my decease," was held to be a good and valid deed of conveyance.

In *Wall v. Wall* (30 Miss. 93), "a voluntary instrument purporting on its face to be a deed, by which land and slaves were conveyed, by terms in the present tense, but reserving a power of revocation to the maker, to be exercised in a certain specific mode, at any time during his life, and also declaring it should not take effect as to the delivery of the property until after the maker's death," was held to vest in the donee an estate *in presenti*, to be enjoyed *in futuro*, and to be a deed, the court holding that the maker evidently intended it should operate as a deed when he reserved the power to revoke it in a specified mode, as the reservation would have been unnecessary if he intended it to operate as a will.

In *Abbott v. Holway* (72 Me. 298), an instrument purporting to be a conveyance of land to the wife of the grantor, with this clause in it:

"This deed is not to take effect and operate as a conveyance until my decease, and in case I shall survive my said wife, this deed is not to be operative as a conveyance, it being the sole purpose and object of this deed to make a provision for the support of my said wife if she shall survive me, and if she shall survive me, then and in that event only, this deed shall be operative to convey to my said wife said premises in fee simple," was held to be a good and valid deed.

In *Chancellor v. Windham* (1 Rich. L. 161), a deed where-
by a father gave, granted and released to his son a tract of

land at the father's death was held to be a good covenant to stand seized to uses; and it was held that the son became entitled to the land on the death of the father.

In *Alexander v. Burnett* (5 Rich. L. 189), an instrument under seal, in the form of a deed, whereby a brother, in consideration of love and affection, and of one dollar to him paid, "*gave, granted, bargained and sold,*" to his sister, a negro, and thereby warranted the title to the negro, with this clause therein: "It is clearly and unequivocally understood that the aforesaid deed of gift is to be of no effect whatever until I, the aforesaid Benjamin Johnson, depart this life," was held to be valid as a deed, and that it conveyed "a present title to the donee with postponement of the right of possession until the donor's death.

We think that the instruments in question were valid deeds, and conveyed a present title to the donees, with the postponement of the right of the use and possession until the donor's death. It is obvious that the intention of the donor was to give his property to the children mentioned in the deeds, reserving the right to use and hold the same and to enjoy the profits thereof during his life. The evidence of this intention afforded by the instruments themselves are: 1. The form is that of a deed, the words "grant, bargain, sell, and convey," used, being appropriate to the office of the deed, and inappropriate to a will. 2. They contain a covenant of warranty, whereby the donor agrees to forever warrant and defend the title to the land to the donees and their heirs and assigns against all lawful claims whatsoever. 3. The donor himself calls them deeds of conveyance; and it is unreasonable to suppose he would call what he intended as a will deeds of conveyance. 4. They were executed, delivered, and acknowledged as deeds. The only words used in them that can be said to be evidence of an intention to make a will are, "and the *deed* shall go into full force and effect at my death." But we are to construe these words in connection with the whole deed. Every part must have effect, if the same can be done con-

sistently with the rules of law. Construed in this way, it is evident the intention of Nicks was to give the land, and sell the personal property he had at the time they were executed, to the grantees, and to reserve the use and enjoyment thereof for and during his life. If such was not his intention how could the deed take effect at his death? This was the only way they could go into full force and effect, and this, according to the authorities cited and our own opinion, was their intention and effect. To give them any other construction would be to say the donor did not understand the meaning of the words used; and that when he said "*does grant, bargain, sell and convey,*" he meant I give, bequeath and devise; and when he used the words "to have and to hold the within granted lands and premises unto the said party of the second part, his heirs and assigns forever, and the party of the first part will, and his heirs and assigns shall, forever warrant and defend the title to the same unto the said party of the second part, his heirs and assigns, against all lawful claims whatsoever," he meant nothing.

The evidence introduced on the hearing was not sufficient to show that the donor was incompetent to execute the deeds, or that they were procured through fraud and undue influence. All men are presumed to be sane and competent to transact their business, and fraud is never presumed. The burden of proof was on appellees.

The decree of the court below is therefore reversed, and the complaint is dismissed.

Exoneration of personality.—It is a well established and elementary rule in the administration of assets, both in England and in this country, that the personal estate is the primary fund for the payment of debts and legacies. 4 Kent's Com. (5th ed.) 420; 2 Jarman on Wills, 546; 1 Story's Eq. Jur. § 571; 2 Vern. 248; Ram, Assets, Chap. 8, § 5; 1 Redfield on Wills, 275, 276; Hill Tr. 350, 351; Bisph. Eq. 321; Snell Eq. 221; Smith Eq. 220.

The court, however, will subject land to legacies *inter alia*; (1) where

it is converted into personalty or "out and out" for general purposes; *Ex-parte Dennison*, 3 Ves. Jr. 551; *Hincliffe v. Jones*, 4 Harrington, 337; (2) when provision is made for wife or child; *Lypet v. Carter*, 1 Ves. Sr. 499; (3) when the words of testator would charge it with debts. *Trott v. Vernon*, 2 Vern. 708; s. c. *Prec. in Ch.* 430; *Kightley v. Kightley*, 3 Ves. Jr. 330; *Shallcross v. Finden*, 3 Ves. Jr. 738; *Beauclerk v. Dormer*, 2 Ves. Sr. 313. But the personal estate is not to be applied in case of the real to the defeating of any specific legacy, or of the wife's claim to her paraphernalia. *Long v. Short*, 1 P. Wms. 403; *Pool v. Sacheverel*, 1 P. Wms. 676, 678; *Oneal v. Mead*, 1 P. Wms. 693; *Tipping v. Tipping*, 1 P. Wms. 729, 730. And land cannot be exonerated out of personal estate to the prejudice of any person having a prior claim to be satisfied. 2 *Williams' Executors*, 1207.

The intention of the testator is the determining consideration.—To exempt the personal estate of a testator from this primary liability, there must be "a clear intention" expressed by, or "a demonstration plain" of such intention, gathered from the whole will, both to exonerate the personal estate and also to onerate or charge the real estate or some portion of it. *Co. Litt.* 208 b, *Butler & H.*, note 106; *Lovel v. Lancaster*, 2 Vern. 183; *White v. White*, 2 Vern. 43; *Howel v. Price*, 1 P. Wms. 291, *Cox's* note; *Walker v. Jackson*, 2 Atk. 624; *Bridgman v. Dove*, 2 Atk. 202; *Ancaster v. Mayer*, 1 Bro. Ch. 454, note; *Gray v. Minnethorpe*, 3 Ves. 103; *Burton v. Knowlton*, 3 Ves. 107; *Brummel v. Prothers*, 3 Ves. 111; *Tait v. Northwick*, 4 Ves. 816; *Hartley v. Hurle*, 5 Ves. 540; *Brydges v. Phillips*, 6 Ves. 567; *Watson v. Brickwood*, 9 Ves. 447; 2 *Jarman on Wills*, 575, 576, on this case; *McClelland v. Shaw*, 2 Sch. & Lef. 538; *Driver v. Ferrand*, 1 Russ. & M. 681; *Bootle v. Blundell*, 1 Meriv. 192; *Walker v. Hardwick*, 1 Mylne & K. 396; *Rhodes v. Rudge*, 1 Sim. 79; *Ouseley v. Anstruther*, 10 Beav. 458; *Powell v. Riley*, L. R. 12 Eq. Cas. 175; see, also, opinion of Sir R. Malins, V. C., in *Forrest v. Prescott*, L. R. 10 Eq. 549; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Rogers v. Rogers*, 1 Paige, 188; *Hancock v. Minot*, 8 Pick. 87; *Seaver v. Lewis*, 14 Mass. 83; *Tole v. Hardy*, 6 Cow. 383; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; and the following text-writers: 1 *Story Eq. Jur.* §§ 571, 577; 2 *Jarman on Wills*, 565-583; 3 *Williams on Executors* (6th Am. Ed.), 1806-1815, or pt. 4, bk. 1, chap. 2, §§ 1, 1704, 1712; *Hawkins on Wills*, Am. Notes, 287; *Perry on Trusts*, 514; *Smith's Eq.* 272; Eng. and Am. notes to *Ancaster v. Mayer*, 1 Lead. Cas. Eq. *646, 673; 2 Lead. Cas. Eq. Eng. and Am. notes to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. *92, 110.

The personal estate being the primary fund for the payment of debts and legacies, the burden of proof lies on those who contend that it is exonerated. English note to *Ancaster v. Mayer*, 1 Lead. Cas. Eq. *646; *Whieldon v. Spode*, 15 Beav. 539.

Accordingly, to exonerate personal estate from the payment of debts, there must appear on the face of the whole will a manifest intention to that effect. *Driver v. Ferrand*, 1 Russ. & Myl. 681; *Greene v. Greene*, 4 Madd. 148. But the intention may be collected from the whole will, and need not be *in totidem verbis*. *Tait v. Northwick*, 4 Ves. 824.

No particular form necessary.—No peculiar form of expression is necessary in order to exonerate the personal estate. If the intention of the testator be evident to exonerate the personalty, it must be exonerated. *Webb v. Jones*, 2 Bro. Ch. 60.

In *Noel v. Weston*, 3 Ves. & B. 272, Sir Thomas Plumer, V. C., states the effect to be allowed to a general introductory clause of a will, expressing a general intention that debts, funeral charges, etc., shall be paid, viz., "to be considered as the rule, in some respects overrunning the whole will." In *Powell v. Riley*, L. R. 12 Eq. Cas. 175, before Sir R. Malins, V. C., in a case where a testator had bequeathed all his household goods and furniture, farming stock, money, goods, chattels and effects, and all other his personal estate, to his wife absolutely, and then devised a freehold estate, called the Rye Crofts, for sale and payment of debts, and the surplus to his wife, and then devised another freehold estate to his wife absolutely, and other estates to his wife for life, with remainders over, and the Rye Crofts estate was insufficient for payment of debts, it was held that the bequest of personalty to the wife was specific, and that such bequests and the specifically devised real estates must contribute ratably to the payment of the surplus debts for which the Rye Crofts estate was insufficient. In so ruling the Vice Chancellor cited without disapproval the cases of *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Lance v. Aglionby*, 27 Beav. 65; *Gilbertson v. Gilbertson*, 34 Beav. 354; and distinguished the case before him from those of *Taylor v. Taylor*, 6 Sim. 246; *Tower v. Rous*, 18 Ves. 132, 138.

The intention of exoneration may be found not only in the manner in which the personal estate is given, but also in the mode in which the real estate is given. *Hancox v. Abbey*, 11 Ves. 186. Mr. Smith, in his *Manual of Equity*, p. 272, says: "If the real estate is directed to be sold for payment of debts, and the personal estate is expressly bequeathed to legatees, then the personal estate will be exonerated by necessary implication. But neither of these circumstances, apart from the other, and from circumstances affording similar implication of intention, is a sufficient indication of an intention to exonerate the personal estate." In *Burton v. Knowlton*, 8 Ves. Jr. 107, under a devise to sell and pay funeral expenses and debts, the personal estate was held to be exempt without express words to that effect, upon the evident intention shown in the will.

A court of chancery will so marshal assets that, as far as possible, the whole will may take effect and all the legatees be paid. *Masters v. Masters*, 1 P. Wms. 421, 422.

For further examples of cases of exoneration of personal estate from debts, or from debts and legacies, see *Hale v. Cox*, 3 Bro. Ch. 322; *Waring v. Ward*, 5 Ves. 670; see, also, 1 Story Eq. Jur. §§ 571, 574.

Of the effect of a specific devise.—When the personal estate is given in a will as a specific legacy, it is not to be applied in exoneration of the real estate. *Walker v. Jackson*, 2 Atk. 624; 1 Wil. 24; Bunb. 302.

In the distribution of assets, the court always applies those not specifically given to any one, before those that are specifically given. *Ex parte Dennison*, 3 Ves. Jr. 552.

A specific bequest is merely the severance of that particular property from the great body of the estate, and the specific gift of it to the legatee. 1 Roper's Legacies, 185, 186. A devise of all the rest of the testator's property is a residuary, not specific, devise; and the person taking it does not come in until after the debts, by specialty or otherwise, have been paid out of his inheritance. *Long v. Short*, 1 P. Wms. 403; *Whitman v. Norton*, 2 Binn. 532; s. c. C. Binn. 390. But equity will charge the real estate with debts, in order to enlarge the fund for the payment of the legacies as well as debts, whether the legacies be specific or pecuniary, provided they be not residuary. *Davis v. Gardner*, 2 P. Wms. 188, 190; *Rider v. Wager*, 2 P. Wms. 330, 335. It has been held that a gift of all one's personal property as a specific bequest (the term "effects" coupled with the context), there being real estate out of which the debts may be paid, operates to exonerate the personal estate therefrom. *Michell v. Michell*, 5 Madd. Ch. 69; *Greene v. Greene*, 4 Madd. 148.

Although as a general rule the bequest of "all my personal property" is not sufficient to exempt the personal estate unless another fund has been expressly provided for the payment of debts, etc., and the intention to exempt is apparent from the will. A specific bequest is a bequest of a specified thing, or an ascertained and defined part or portion of the personal estate separated and distinguished from the mass. A bequest of all one's personal estate is not technically a "specific bequest," and in equity such a bequest is only called specific for the purposes of construction, and where the intention is otherwise expressed in the will that other property than personality shall bear the charges; that is, in such cases such a bequest is sometimes called specific as distinguished from the real estate. *Howe v. Dartmouth*, 7 Ves. 137, 149; *Walker's Estate*, 3 Rawle, 229; Am. note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 333; *Woodworth's Estate*, 31 Cal. 595, 603; 2 Redfield on Wills, 475; 2 Wms. Ex'rs., 1158, 1172; 1 Roper's Leg., 184, 186; 2 Spence Eq. Jur. 336, 341; *Ward Leg.* 18 Law Lib. 10; *Fairer v. Bark*, L. R. 3 Ch. Div. 309.

Of the effect of directions to convert the realty into personalty.—The law allows the testator to direct an absolute conversion of real estate into

money for all purposes, or what is called a conversion "out and out." To this end it is requisite, not only that the will contain a direction to change land into money, but that it should appear that it was the purpose of the testator that it should, after its conversion, be treated as money for all purposes. 3 Redfield on Wills, 140, § 7; Johnson v. Woods, 2 Beav. 409, 413; Hopkinson v. Ellis, 16 Beav. 169, 175; Shallcross v. Wright, 12 Beav. 505, 508.

The tendency of the American decisions is to treat all directions in devises or contracts to convert land into money, as intending an "out and out" conversion for all purposes, unless the contrary appear from the instrument itself. 3 Redfield on Wills, 140, § 8; In re Place, 1 Redf. 276; Dyer v. Cornell, 4 Pa. 359; Grider v. McClay, 11 Serg. & R. 224; Pennell's Appeal, 20 Pa. 515; Nagle's Appeal, 13 Pa. 262; Smith v. McCary, 3 Ired. Eq. 204.

Where the testator combines real with personal generally, the real is subject to all the burdens of the personal. Kidney v. Coussmaker, 1 Ves. Jr. 444; Hauer v. Sheetz, 2 Binn. 581, 532.

See, also, Miller v. Holt, 1 Am. Prob. Rep. 199; Armstrong v. Armstrong, Id. 206; Clive v. Jones, 5 Id. 341; Estate of Skerrett, Id. 87; Bolman v. Overall, *supra*, 59, and the note; Reed v. Hazleton, *supra*, 532; Cover v. Stem, *supra*, 548, and the cross-references.

SMITH vs. TOWERS.

[69 Maryland, 77.]

TRUSTS.—RESTRICTIONS UPON ALIENATION OF RENTS AND PROFITS.—EXCLUSION OF CREDITORS.

Where a testator devises real estate in trust, the trustee to collect the rents and profits, and to pay the same to the testator's son, "into his own hands, and not into another, whether claiming by his authority or otherwise," the intention of the testator is that the income shall be paid into the hands of his son, to the exclusion of all other persons, whether claiming as alienees or as creditors; and such rents and profits, while in the hands of the trustee, cannot be reached by the creditors of the *cestui que trust* by any process either at law or in equity.

APPEAL from a judgment of the Circuit Court of Caroline County.

William S. Bryan, Jr., for the appellant.

Robert J. Jump, Joshua W. Bryant and Edwin H. Brown, for the appellee.

ROBINSON, J. The testator devised certain real estate to his friend John R. Fountain in trust to collect the rents and profits, and to pay the same to his son Robert, "*into his own hands, and not into another, whether claiming by his authority or otherwise,*" and upon his death to convey said real estate to such children of his son Robert as may be living at the time of his death.

Upon the construction of this clause of the testator's will two questions arise: First, did the testator mean to give the income of the property to his son to the exclusion of his creditors, and secondly, if so are the terms and provisions of the will effectual to carry out this intention. There can be no difficulty whatever as to the first point. He not only gives the legal estate to the trustee, but he directs in express terms that he shall pay the income into the hands of his son and not into the hands of any other person, whether claiming by his authority or in any other capacity. Here, then, is an express provision that the income shall be paid to his son, and an express prohibition against paying it to any other person. If the income in the hands of the trustee is liable to the claims of creditors, the trustee it is plain could not carry out the trust. So construing this will as we do, and it is not we think susceptible of any other construction, the testator meant beyond all question that the income should be paid into the hands of his son, to the exclusion of all other persons, whether claiming as alienees or as creditors.

The next point is one of more than ordinary importance, and has not heretofore been decided by this court. A great deal may be said on both sides, and the question is

not free of difficulty. In England the decisions are all one way, and it is well settled there, that the devise of an *equitable estate or interest for life* to any person, other than a married woman, carries with it, as a necessary incident to such estate or interest, the right of alienation by the *cestui que trust*, and is liable for the payment of his debts, and no provision, by way of inhibition or otherwise, which does not operate as a *cesser or limitation* over of the estate, can protect it against the claims of creditors. (*Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 480; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & Myl. 395; *Youngehusband v. Gisborne*, 1 Collyer, 400.)

In this country, however, the decisions are conflicting, and the Supreme Court of the United States, and the Supreme Courts of other States, have, after full consideration of the English cases, held, that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to his beneficiary, without making it alienable by him, or liable in any manner for his debts, and that such an intention when clearly expressed by the founder of the trust must be respected by the courts. The Supreme Court, after reviewing the English decisions, in an able opinion by Justice Miller, say :

“ But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court. . . . Nor do we see any reason, in the recognized nature and tenure of property and its transfer by will, why a testator who *gives*, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the

life of the donee." (*Nichols, Assignee v. Eaton, et al.* 91 U. S. 725, 727.)

And in the still later case of *Broadway National Bank v. Adams* (133 Mass. 170), argued in June, 1881, and re-argued in March, 1882, the court unanimously held, that property may be conveyed in trust, with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors in advance of its payment to him, although there is no cesser or limitation over of the estate in such an event. Morton, C. J., says: "We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. . . .

Under our system, creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given."

And then, again, in *Rife v. Geyer* (59 Penn. 393), Judge Sharswood, speaking for the court, says: "That a benefactor has the power of thus restricting the enjoyment of his bounty through the medium of a trust during the life of a beneficiary is now the unquestionable law of this State." In *Shankland's Appeal* (11 Wright, 113), the point was expressly decided, and it was there held that a trust to collect and receive rents and pay over the same to a son of the testatrix for and during the term of his natural life, without being subject to his debts and liabilities was an active one, and that the legal estate was vested in the trustee, and no act of the *cestui que trust* could deprive him of it, or allow him to interfere with the collection of the income, and no creditor could touch the income or any interest which the *cestui que trust* had in it.

In Vermont, Connecticut and Kentucky, the highest courts have held that the income of property may be devised in trust for the benefit of the *cestui que trust* for life to the exclusion of the claims of his creditors. (*Ex'rs of White*

v. *White*, 30 Vert. 338 ; *Leavitt v. Beirne*, 21 Conn. 1 ; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56.)

In other States, however, and it may be said in the majority of the States where the question has arisen, the English rule has been adopted without qualification. (*Tillinghast v. Bradford*, 5 R. I. 205 ; *Dick v. Pitchford*, 1 Dev. & Batt. Eq. 480 ; *Heath v. Bishop*, 4 Rich. Eq. 46 ; *Bailie v. McWhorter*, 56 Ga. 183 ; *Rugely and Harrison v. Robinson*, 10 Ala. 702.)

In this State there is no decision to govern us, and with conflicting decisions in other courts entitled to the highest consideration, the question is one after all to be determined by us on principle. The English decisions rest on two grounds, first, that the right of alienation is a necessary incident to an equitable estate for life, and any restraint upon this right is against the policy of the law which favors the ready alienation of property ; and secondly, that public policy forbids that one should have the right to enjoy the income of property, to the exclusion of his creditors. Now the right to sell and dispose of property is a necessary incident of course to the absolute ownership of such property. You cannot give to one a fee simple interest, and then say he shall not sell or dispose of it, because the right to alien it is a legal and necessary incident to the estate granted, and to impose such a condition would be repugnant to the nature and tenure of the estate itself. And besides the best interests of the public require that there should be a ready transmission of property. But the reasons on which the rule is founded do not apply to the transfer of property in trust. Where, by the terms of the trust, the legal estate is vested in a trustee he takes the legal title with the necessary incidents attached to it, and among such incidents is the right to alien it. The *cestui que trust* takes the equitable estate with the right to the accrued income, and when this has been paid to him, the absolute right to dispose of it. So neither the principal nor the income can be said to be inalienable. And, besides, the policy of the law is not against all restraints on the absolute right to

dispose of it. You may give one an estate for life, with a provision that the estate shall go over to a third person upon alienation, voluntary or involuntary, by the life tenant. You cannot give property to be held in perpetuity, but you may give one an estate for life, with a limitation over to lives in being, and twenty-one years thereafter. And so by the English rule you may give an equitable estate for life, with a limitation over or a cesser to a third person, should the life tenant attempt to alien it. Now in all these instances, there is a restraint to a greater or less degree on the right of alienation. The law does not therefore forbid all and any restraints on the right to dispose of it, but only such restraints as may be deemed against the best interests of the community. And the gift of an equitable right to the income from property for the life of the beneficiary, to the exclusion of his alienee, is not, in our opinion, repugnant to the estate or interest granted, nor is it such a restraint on the right of alienation as the law for reasons of public policy forbids.

And then, as to the other ground, that it is against the policy of the law to permit one to hold and enjoy an estate or interest in property for life, whether legal or equitable, to the exclusion of his creditors. Now common honesty requires, of course, that every one should pay his debts, and the policy of the law for centuries has been to subject the property of a debtor of every kind, which he holds in his own right, to the payment of his debts. He has as owner of such property the right to dispose of it as he pleases, and his interest is, therefore, liable for the payment of his debts. But a *cestui que trust* does not hold the estate or interest in his own right; he has but an equitable and qualified right to the property or to its income, to be held and enjoyed by the beneficiary on certain terms and conditions prescribed by the founder of the trust. The legal title is in the trustee, and the *cestui que trust* derives his title to the income through the instrument by which the trust is created. The donor or devisor, as the absolute owner of the property, has the right to prescribe the terms

on which his bounty shall be enjoyed, unless such terms be repugnant to the law. And it is no answer to say that the gift of an equitable right to income to the exclusion of creditors is against the policy of the law. This is begging the question. Why is it against the policy of the law? what sound principle does it violate? The creditors of the beneficiary have no right to complain because the founder of the trust did not give his bounty to them. And, if so, what grounds have they to complain because he has seen proper to give it in trust to be received by the trustee and to be paid to another, and not to be liable while in the hands of the trustee to the creditors of the *cestui que trust*. All deeds and wills and other instruments by which such trusts are created are required by law to be recorded in the public offices, and creditors have notice of the terms and conditions on which the beneficiary is entitled to the income of the property. They know that the founder of the trust has declared that this income shall be paid to the object of his bounty to the exclusion of creditors, and if under such circumstances they see proper to give credit to one who has but an equitable and qualified right to the enjoyment of property, they do so with their eyes open. It cannot be said that credit was given upon such a qualified right to the enjoyment of the income of property, or that creditors have been deceived or misled; and if the beneficiary is dishonest enough not to apply the income when received by him to the payment of his debts, creditors have no right to complain because they cannot subject it in the hands of the trustee to the payment of their claims, against the express terms of the trust. The hardship to them is one that will surely bring about its own remedy, for the dishonest beneficiary it is plain would soon be without credit. And then, as to the rights of creditors, these may be defeated, even according to the English decisions, by providing that in the event of the recovery of a judgment against the *cestui que trust*, or upon his insolvency, his interest in the property shall cease, and shall go to another. Now what advantage to the creditor is the cesser or limitation over? What he wants

is the money due to him, and this is not paid by depriving the beneficiary of the property. But it may be said, that sooner than lose his interest in the property, self-interest, if no higher consideration, will prompt him to pay his debts. There is force in this, but with the best intentions any one may, by the chances and hazards incident to every pursuit in life, be unable to pay his debts, and in that event by depriving one of his property by limitation over to a third person, you may deprive him of the very means by which he might in the future repair his fortune. So it does not seem to us there is any substantial advantage to the creditor, in thus permitting the founder of the trust to do that indirectly which we think he can do directly. And then, again, by the English rule the rights of creditors may be excluded by providing that the income may be paid or not to the beneficiary at the option of the trustee. To impose a requirement, so harsh in itself, upon the bounty of a donor or deviser who may desire to provide for the certain support of the object of his bounty is not warranted, it seems to us, by any principle of justice or sound public policy. And a rule of law which requires this to be done, and one which may be evaded by carefully drawn terms and provisions, is hardly worth preserving. Upon principle, therefore, we are of opinion, that the founder of a trust may provide in direct terms that his property shall go to his beneficiary to the exclusion of his alienees, and to the exclusion of his creditors. This being so, the rents and profits in the hands of the trustee, and which the testator in the will before us directs shall be paid into the hands of his son Robert, and "not into the hands of another, whether claiming by his authority or otherwise," cannot, in our opinion, be reached by his creditors by any process, either at law or in equity, before such rents and profits are paid to him.

Judgment affirmed.

ALVEY, C. J., and BRYAN, J., dissenting.

See, also, *Simpson v. Cook*, 1 Am. Prob. Rep. 27; *Monarque v. Monarque*, Id. 494; *Robert v. Corning*, 3 Id. 178; *Bates v. Bates*, Id. 212; *Baker v. Brown*, *supra*, 289.

THE UNIVERSITY *vs.* TUCKER.

[31 West Virginia, 621.]

CONSTRUCTION OF A WILL.—LIFE ESTATES.—BEQUESTS TO
FOREIGN EDUCATIONAL CORPORATIONS.—AMBIGU-
ITIES.—WASTE.

Foreign corporations may take bequests of charities under a will made in this State, when and to the extent authorized by their charters. When such corporations are improperly described in the will, the bequest will not fail, if it be clearly shown by proper proof what corporations were meant by the description. Where the testator gave to a devisee in clear and express words a life-estate only, and in a codicil provided that moneys paid to the executor on "obligations owing to the testator should be invested in bonds of the United States, the interest of which should go to said life-tenant, and such life-tenant should likewise have the profits of the testator's estate not given to his wife," the use of this language did not change the life-estate into a fee. A contingent remainder-man may maintain an injunction to restrain waste by the life-tenant. The taking of clay from the soil by a life-tenant, and manufacturing it into brick and selling the brick, is waste.

APPEAL from a decree of the Circuit Court, of Wood County. The facts are disclosed in the opinion.

J. Dallas Ewing, for the appellant.

H. C. Harvey, for the appellees.

JOHNSON, Pres. Ezekiel Harker, of Brooke county, on the 29th day of April, 1865, made his last will and testament, in the first clause of which he directed the payment of debts, etc. In the second clause he used the following language: "I give and devise to my wife, Elizabeth Harker, the house I now occupy with the lot, on which it stands, containing about six acres, which I purchased from C. B. Prather; also the lot of ground thereto adjoining which I purchased from O. W. Langfitt, and the lot of ground I purchased from Richard Starr, adjoining same, together with all the household goods, farming utensils, and other visible property, on or about said premises at the time of my death, to be hers during her natural life, or so long as she remains my widow, and no longer. I also give and devise to my said wife, dur-

ing her natural life, or while she remains my widow and no longer, my property annuity in Temperanceville, Allegheny county, Pennsylvania. . . . The above is to be taken in full of any and all rights that my said wife might have under the law as my widow in and to my estate, either real or personal."

By the third clause he bequeathed to Martha Thorn a house and lot in Wellsburg, known as the "Lazier Property."

The fourth clause of the will is as follows: "After the death or marriage of my wife, Elizabeth Harker, I will and direct that all my property, real and personal, and wherever located (except the property devised to Martha Thorn), go and pass to the use of my adopted daughter, Sarah Harker Potter, for and during her natural life; but if said Sarah Harker Potter shall marry and bear a child or children by said marriage, and shall have at her death a child or children of the age of twenty one years, then and in that event, upon the death of said Sarah Harker Potter, all of my said estate, real and personal, shall pass to and belong absolutely to said child or children, which may have arrived at the age of twenty one years; it being the intent and purpose of this clause of my will that said Sarah Harker Potter shall have a life estate in my real and personal property, except the house and lot herein given to Martha Thorn, wife of Amos, and in the event she shall marry and by virtue of such marriage bear a child or children and said child or children shall arrive at the age of twenty one years, and they or either of them being alive at her death, then and in that event, the property aforesaid, the property shall go and pass to such child or children equally, share and share alike."

The fifth clause provides: "But if said Sarah Harker Potter shall die leaving no children by legal marriage, or if she shall die leaving a child or children by legal marriage, but said child or children shall die before arriving at the age of twenty one years, then the property devised by the fourth clause of this will shall go and pass, share and share

alike, to the Lewisburg Baptist University and the successors in office of said University, and to the Baptist Publication Society in Philadelphia, Pa."

On the same day the testator made a codicil to his will, witnessed by the same witnesses, whose names are subscribed as attesting witnesses to the will. The codicil is as follows: "I give and bequeath to my friend William P. Townsend the sum of five hundred dollars, for his services rendered, and hereafter to be rendered, out of funds now in his hands. (2) I will and direct that Sarah Harker Potter shall keep the property on which I live, and the house in Wellsburg, being the property bought from Connell, in good repair; and if she shall fail to do so, then my executors named in this will shall keep the property out of any funds belonging to my estate.

"Any funds coming into the hands of my executors by the payment of obligations owing to me shall be vested by my executors in bonds of the United States, the interest of which shall go to Sarah Harker Potter. She shall likewise have the profits of my estate not given to my wife, Elizabeth Harker. And I do declare this to be codicil No. 1 to my last will and testament."

The will was admitted to probate on the 26th day of September, 1865. At May rules, 1884, in the Circuit Court of Brooke county, contingent remainder-men, the University at Lewisburg and the American Baptist Publication Society, filed their bill, in which they set forth said will, and that Elizabeth Harker is dead; that Sarah Harker Potter married one William Tucker, but that she is childless; that she has leased a portion of the property, in which she had a life estate, to Benjamin Jacobs, John W. Jacobs and Emery Jacobs, for the purpose of making brick from the clay on said ground and selling said brick in the market; that they are committing waste by taking the clay and making holes and ditches in the ground; that she had no right to lease the ground for any such purpose; that she only has a life-estate in the land, and if she die childless, or if she has children who do not arrive at the age of twenty one years,

they will be entitled to the property in fee ; that they are incorporated and capable of taking the bequest, etc., and prayed an injunction against the waste. The bill also sets up the fact that Tucker and wife had brought a suit some time before in the Circuit Court of Brooke County against one George M. White for the specific performance of a contract of sale of a part of said land, in which they made the plaintiff here defendants, and set up said will and insisted that under it Mrs. Tucker owned the fee in the land and not a life estate only. There was a demurrer to the bill, and the demurrer was sustained and the bill afterwards dismissed, and the plaintiffs here insist that the defendant, Sarah H. P. Tucker, is here estopped to claim the fee in said land ; that the question is *res judicata*.

The bill exhibits the process and return to the bill, the demurrer, the decree sustaining the demurrer, and the order at a subsequent term dismissing the bill, as the plaintiff had failed to amend.

The defendants, Tucker and wife, demurred to the bill filed in this cause for want of equity. The demurrer was overruled. They then answered the bill, in which answer they insist, that by the proper construction of said will and codicil on the death of Elizabeth Harker, Mrs. Sarah H. P. Tucker took the remainder of the estate in fee ; that the clause in the codicil that the said Sarah "should likewise have the profits of my estate not given to my wife Elizabeth Harker," gave to said Sarah a fee-simple in the remainder of the estate, the words being repugnant to the clause in the will limiting her to a life-estate. They admit the lease and claim, they had a right to lease the property and do, as the bill had alleged they had done, in respect to the property. The answer denies, that plaintiffs are corporations capable of taking by devise the said property, and for that cause insists, that the property is vested in the female defendant under the residuary clause in the codicil in accordance with section 13, ch. 77 of the Code. Respondents admit the land is valuable, and their right to its use is valuable to them ; but they deny that, after the clay is removed under this

contract with their co-defendants, the land will be less valuable, or that it will be left in ditches and pits, or be rendered unfit for building sites, but, on the contrary, that it will be of better grade, more valuable, and more suitable for building purposes, as they are advised.

The other defendants, the lessees, answered the bill, and they also insist, that under Ezekiel Harker's will Mrs. Tucker took the fee after Elizabeth Harker's death. They admit they made a contract with Tucker and wife to take clay on part of said land and manufacture brick, and that they have a right under and by virtue of said agreement or lease to make and burn brick on said land and sell the same. They exhibit the said agreement with their answer, and by it they have the right for five years from the date thereof—the 13th of February, 1884—provided Mrs. Tucker should live so long, to make and sell brick on the premises, and were to pay Mrs. Tucker seventy five cents for every 1,000 bricks made and burned on the premises ; and the parties agreed to make at least 300,000 bricks every year of the term. The bill exhibits the charters of both the plaintiffs, which show that each was incorporated at the time the will was made.

Proof was taken to show, and it clearly shows, that they were the identical corporations meant by the testator, although they are not accurately described in the will. The testator calls one the "Lewisburg Baptist University," and the other the "Baptist Publication Society in Philadelphia, Pa." The correct names are, as disclosed by their respective charters, "The University at Lewisburg," and "The American Baptist Publication Society." The cause was removed to the Circuit Court of Wood county, and on the 29th day of November, 1884, was heard ; and the court decided, that by the will of Ezekiel Harker the defendant, Sarah H. P. Tucker, took only a life estate, and that the plaintiffs were capable of taking under the will ; but, as the court was not fully satisfied that the plaintiffs were the identical corporations named in the will, it was ordered, that testimony be taken on that question. The court was

further of opinion and held, that the record of the former trial was a bar to further litigation between the parties on the question as to what estate Mrs. Tucker took under the will; and on the 15th day of July, 1885, the proof as to the identity of the corporations having been taken, the court perpetuated the injunction with costs. From these two decrees the defendants, Tucker and wife, appealed.

The first question presented is: Have the plaintiffs, being contingent remainder-men, the contingency not having yet happened, a right to maintain this suit? A contingent remainder of inheritance as well as a vested remainder is transmissible to the heirs of the person to whom it is limited, if such person chance to die before the contingency happens. (1 Lomax Dig. 466.) Lomax further says: "Although a contingent remainder cannot be passed or transferred by a conveyance at law before the contingency happens, otherwise than by estoppel, by deed or fine, or by a common recovery, wherein the person entitled to the contingent estate comes in as a vouchee, yet it seems that contingent estates are assignable in equity. Contingent remainders were formerly held not to be devisable by the person entitled thereto, whilst they remained in contingency, but it has been determined in some modern cases, that where contingent remainders are descendible to the heirs of the persons entitled to them, they may be devised by will like any other estates." (Id. 467; *Perry v. Jones*, 1 H. Bl. 30; *Perry v. Phelps*, 17 Ves. 182.) From this it appears, that the contingent remainder-man, before the contingency happens, has such an interest in the estate as to authorize him to maintain an injunction against the life-tenant to restrain waste; and it has been so held. (Fearne Rem. 563; *Bewick v. Whitfield*, 3 P. Wms. 268, note; *Williams v. Bolton*, 1 Cox, 72.)

It was assigned as error by the appellant's counsel, that no rule was given defendants to answer the amended bill. This point is not made in the arguments for appellants, because no doubt the record shows, that the bill was amended before their appearance. But it is here contended by counsel for appellant, that Mrs. S. H. P. Tucker under the codicil

of the will took a fee in the estate ; that notwithstanding the fact that in the will she was by express words limited to a life-estate, yet this language in the codicil : " She shall likewise have the profits of my estate not given to my wife, Elizabeth Harker," changes the will and gives her a fee, being repugnant to the words used in the will. (Counsel cites, to sustain this position : *Bolling v. Robertson*, 6 Munf. 220 ; *Allan v. Backhouse*, 2 Ves. & B. 65 ; *Backhouse v. Middleton*, 1 Ch. Cas. 173 ; *Schermerhorne v. Schermerhorne*, 6 Johns. Ch'y, 70 ; *Felton v. Hill*, 41 Ga. 554.)

In *Bolling v. Robertson* no opinion was delivered, but the decree of the chancellor was affirmed. The will contained this clause : " All my negroes and stock in the counties of Goochland and Powhatan be, the December after my death, equally divided between my said wife and my son, William Bolling, to be kept together and worked on my estate known formerly by the name of ' Licking Hole,' now ' Bolling Hall,' and on my island called ' Bolling's Island,' both lying and being in the county of Goochland, and on my plantation in Powhatan called ' Hamstead,' and the profits thereof to be equally divided between my said wife and my son, William Bolling," etc. On the 2d day of July, 1818, Chancellor Taylor decreed that the wife took one moiety of the negroes, etc., absolutely. " He rejected that construction of the will of Thomas Bolling, deceased, which would render utterly useless, insensible and inoperative that provision of the said will, which directs that all the testator's negroes and stock in the counties of Goochland and Powhatan should be, the December after his decease, equally divided between his wife, Betty Bolling, and his son, Willing Bolling, and gave such a construction to the said will as would render all its parts sensible, consistent and operative." In this case the chancellor did not give to the word " profit " any technical meaning.

In *Allan v. Backhouse* (2 Ves. & B. 65), the words " rents and profits " were extended beyond their natural meaning, " annual profits," to " mortgage or sale," because necessary to effect the object—raising a gross sum. In the opinion

it was said: "It was fairly argued that, though the natural interpretation of these words is 'annual rents and profits,' and such a direction to raise money by rents and profits seems to be put in contradistinction to sale or mortgage, the word 'profits' *ex vi termini* includes the whole interest, as a devise of the profits would pass the land itself. A direction of this sort, however, to raise money out of the rents and profits, is not exactly the same as a devise of the estate under that description by giving the profits. The construction cannot depend on the effect of the word 'profits' *per se*, which would include all the land might produce; but the word 'profits' is to be taken, as it stands here, coupled with the rents. Whatever might be the interpretation of these words, if the case were new—whatever doubt might arise as to whether they denoted annual or permanent profits, there is no room now for speculation, this Court having in a number of cases, where the object was to raise a gross sum at a fixed time, extended the meaning of the words, unless restricted by other words, so as to confer a power to raise such a sum by sale or mortgage." In *Schermerhorne v. Schermerhorne* (6 Johns. Ch'y, 70), it was held that the words "rents and profits" in a devise may be so construed as to authorize a sale of the land, when necessary to raise a sum so as to effect the object of the testator. In that case Chancellor Kent said: "In the present case, the testator, no doubt, had it in contemplation, that the rents and profits of the farm without a sale would be sufficient to support the lunatic, and that the estate after her death would go to Abraham Schermerhorne and his heirs. But his other intention was equally manifest, that his daughter must at all events be comfortably maintained out of the profits or proceeds of the farm; and he expressly authorized 'any means,' by which the farm was to produce the requisite 'profits.' And if that end can not be otherwise obtained it is the duty of the court, in obedience to the long and uniform course of authorities, and to the necessity of the case, to direct a sale of the farm." By the will in that case, the executor was authorized to lease (the farm), "or

by any other means out of the profits therefrom arising " to support and maintain Nelly during her natural life. It seems to us clear, that it was the intent of the testator, that Nelly should have a comfortable support, if it required the whole farm to furnish it. Chancellor Kent said : " The great object of the will was the comfortable maintenance of that afflicted and unfortunate daughter, and the testator has shown a strong solicitude on that point throughout the will."

In *Felton v. Hill* (41 Ga. 554), the first clause of the will gave to John Micajah Felton, the eldest son, " for and during the term of his natural life," five negroes and a tract of land. And to make it more specific, he further said : " And I furthermore declare that the control and possession, which I hereby give to my son, John Micajah, of the property aforesaid, shall amount to nothing more than a life-estate in the same," etc. By the first clause of the codicil to the will the testator provided as follows : " In the first clause of my said will I gave and bequeathed to my son, John Micajah, a life-estate in certain property therein mentioned. Now I revoke so much of said clause as relates to the lands therein specified, and hereby give and bequeath to my son, John Micajah, all my claim, title and interest to and in the town of Montezuma, and the parcel of land connected therewith, consisting of twenty acres more or less, which I jointly hold with John T. Brown ; and my son, John Micajah, is to have no portion of any lands except the said Montezuma property, to the extent as aforesaid. And further my said son, John Micajah, is to pay to my executors all the money or sums that I have advanced to him, or paid on his account, or may hereafter advance or pay on his account, except one share thereof, equal to a share, counting my said wife, Lavinia, and all my children each as a shareholder, which one said share he is permitted to retain for his own use, and no more." By the second clause of the codicil he provided : " All my lands then withdrawn from the provisions of the said first clause of my said will are to be sold by my executors, and the proceeds thereof to be equally divided among

all my children, share and share alike, including John Micajah."

The court very properly held that John took an absolute estate in the property under the codicil. The codicil clearly manifested the intent of the testator to change the provision made for his son, John, and he clearly withdrew all the lands from the provisions of the first clause of the will, giving by the codicil his interest in the Montezuma property to John in fee. As has been uniformly held everywhere, it is the intent of the testator that must govern the disposition of his property. And that intent, whenever it is possible to do so, must be gathered from the will itself. Every word in the will must be given its natural effect, provided this can be done consistently with the general intent of the whole will taken together; and no word is to be rejected unless there cannot be a rational construction of the will with the word as it is used. All the parts of the will, including codicils, which are parts of the will, are to be construed together, so as, if possible, to form one consistent whole. (*Graham v. Graham*, 23 W. Va. 36; *Hinton v. Milburn*, Id. 166; *Couch v. Eastham*, 29 W. Va. 784; 3 S. E. Rep. 23.)

It seems to us, that the intent of the testator in the will before us is very apparent. First, he desired to provide for his wife; so he gave her a life-estate in certain real and personal property. He then gave a house and lot in fee to Martha Thorn. After the death of his wife he desired all his real and personal property, except the house and lot devised to Martha Thorn, to go to his adopted daughter, Sarah Harker Potter, for life. Then, if she married and had children who arrived at the age of twenty-one years, he desired all his property to go absolutely to those children. He wished to provide for his wife for life, his adopted daughter for life, and, if she had children who should live to maturity, he desired that they should have his property; and he still had other objects of his bounty, in case his adopted daughter should die childless, or her child or children should die under twenty-one years of age. In that event he declared the property should go to the plaintiffs. On the same day

he executed his will, and perhaps at the same time, he seems to have recollected some property he had forgotten. He had not during his wife's lifetime disposed of the property known as the "Connell" property, nor bonds, etc., "owing to him." All this property was included in the fourth clause of the will, and was after the death of his wife bequeathed to Sarah H. Potter for life; described as "all my property, real and personal, and wherever located" (except the property devised to Martha Thorn). Therefore, instead of having his will re-written he executed a codicil. He directed his adopted daughter, Sarah Harker Potter, to keep the property where he lived and the "property bought from Connell" in good repair; and if she failed to do so he directed his executors to do so. He also gave his friend, William P. Townsend, a bequest of \$500.00, and provided in the codicil as follows: "Any funds coming into the hands of my executors by payment of obligations owing to me shall be invested by my executors in bonds of the United States, the interest of which shall go to Sarah Harker Potter. She shall likewise have the profits of my estate not given to my wife, Elizabeth Harker." It cannot be supposed that the word "interest" carried with it the bonds. Such a construction would do violence to the manifest intent of the testator. It is clear, that the testator intended all the moneys paid to his executors should be by them invested in United States bonds, and the accruing interest paid to the adopted daughter. Then he says she shall likewise, in like manner, just as the interest on the bonds is to be paid, "have the profits of my estate not given to my wife," that is the annual profits. No necessity here to raise a certain gross sum, which should be paid to her. It is not said, as in the case in 6 Johns. Ch'y (*supra*), that the intent of the testator was, that Sarah Harker Potter should receive her support from the "profits" of the "Connell" property. There is no repugnance between the language used in the codicil and the will. They can well stand together. Clearly Mrs. Tucker only took a life-estate under the will of Ezekiel Harker. Section 8 of chapter 71 of the Code, cited by ap-

pellant's counsel, does not apply, because according to the exception therein contained, a "contrary intention does appear by the will." To give the construction contended for by counsel for appellant would also destroy the devise made to Martha Thorn, which is clearly against the intent of the testator. Having arrived at this conclusion, it is immaterial to inquire whether this question was *res judicata* by the former suit.

Could the corporations take the bequest to them? It is unnecessary to discuss this question, as it was thoroughly considered in *Wilson v. Perry* (29 W. Va. 169; 1 S. E. Rep. 302), and this Court decided, that corporations have the legal capacity to take charitable bequests, when and to the extent authorized by their charters. It was further held, that, where the person, object or subject referred to in a bequest is uncertain or does not precisely answer the description given in the will, or where there are two or more objects or subjects which equally answer the description, resort may be had to parol evidence and surrounding circumstances to show what the testator intended by the expressions which he used; and, if such intention is ascertained with sufficient certainty, the bequest is valid; that where the name or description is erroneous, and there is no reasonable doubt as to the person who was intended to be named or described, the mistake will not defeat the bequest; and that the same rule applies as well to corporations as individuals.

Here the proof clearly shows that the testator intended the "University at Lewisburg" and the "American Baptist Publication Society," by the description of the corporations used in the will.

Is it shown in this record that waste was committed? It is charged in the bill, and not denied in the answer, that the defendants, Tucker and wife, leased a part of the premises to Jacobs and others for the purpose of taking the clay to manufacture into brick; and the lease is exhibited with the answer of the tenants and shows it is for a term of five years, and the tenants bound themselves to manufacture 300,000 brick per year, and pay to Mrs. Sarah H. P. Tucker 75 cents

per thousand for said brick; and it appears from the pleadings that the defendants, the tenants, had manufactured and sold brick, and were proceeding to do so when the injunction was granted. According to all the authorities this is waste. It is taking the very substance of the inheritance. There is no evidence that brick was made on the land in the lifetime of the testator. In *Smith v. Rome* (19 Ga. 89), it was held to be waste to take rock from land for the purpose of paving the streets of a city. The life-tenant cannot cut turf on bog lands for sale. (1 Co. Litt. 54b.) He cannot dig for gravel or lime, clay, brick, earth, stone or the like except for repair of the buildings or the manuring of the lands. (*Dickinson v. Jones*, 36 Ga. 97.) The life-tenant has the usufruct of the land. He can enjoy the annual produce of the land during life, but he must not do any damage to the absolute property in the remainder-man.

The decree of the Circuit Court of Wood county perpetuating the injunction is affirmed.

Affirmed.

Federal land grants to the States in aid of educational institutions.—The Act of Congress granting certain lands in the State of New York belonging to the Federal government to the State, in aid of certain educational institutions in that State, and the direct and unequivocal acceptance of its terms and provisions by the act of the legislature, constituted a contract between the United States and the State of New York, which is equally obligatory on both of the sovereign parties. "The United States is a body politic and corporate, and as such is capable of contracting." "The capacity of the United States to contract is co-extensive with the duties and powers of government. Every contract which subserves the performance of a duty may be rightfully made." *U. S. v. Maurice*, 2 Brock. 96, 100, 110; *U. S. v. Tingey*, 5 Peters, 114; *U. S. v. Bradley*, 10 Peters, 348; *U. S. v. Hudson*, 10 Wall. 395; *U. S. v. Linn*, 15 Peters, 290, 311. The same principle in all its plenitude applies to the State. *Danolds v. State*, 89 N. Y. 37, 44; *People v. Stephens*, 71 N. Y. 527; *McMaster v. State*, 108 N. Y. 542. "It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State constituted a contract. All the elements of a contract met in the transaction, competent parties, proper subject-matter, sufficient consideration and consent of minds. The contract was binding upon the State." *McGee v. Mathis*, 4 Wall. 143, 155. This was the language of Chief Justice Chase, and was

used with reference to a grant made by the United States to the State of Arkansas, conferring upon the State the power and imposing the duty of using the land for certain purposes, which it was claimed the State had not fully performed. It was held that the legislature of the State had violated the contract by attempting to appropriate the property in a different manner, or for other purposes, and that such misappropriation was ineffectual and void. "It is impossible to conceive of one joint act performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty." *Chicago, &c., R. Co. v. Auditor-General*, 53 Mich. 79, 91.

The State, by accepting the trust, assumes the duties and obligations of trustee, and agrees to invest, protect and manage the fund, and apply the income in accordance with the terms of the Act of Congress. "The State may sustain the character of a trustee. It has a legal capacity to take and execute trusts for every purpose." 1 Perry on Trusts, §§ 40, 41; *Ex'rs of McDonough v. Murdoch*, 15 How. (U. S.) 367, 415; *Mitford v. Reynolds*, 1 Phill. 185, 194. If a State accepts a trust, it must act through its legislative powers in administering the trust, or in creating or appointing agents or officers to perform the duties which it assumes. 1 Perry on Trusts, § 41. The contract creating the trust is itself of the law making power; and this contract, as embodied in the Act of Congress, even if it were in plain violation of the general laws of the State and of the United States, is, nevertheless, the arbitrary law of the trust. But the trust, in all of its essential features, irrespective of the Act of Congress, would be sustained as valid in the courts of England and the United States. *Odell v. Odell*, 10 Allen, 1, and cases cited; *Ex'rs of McDonough v. Murdoch*, 15 How. (U. S.) 367; *Perin v. Carey*, 24 How. (U. S.) 466; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127; *Magdalen College v. Attorney-General*, 6 H. of L. Cas. 189; *Philpot v. St. George's Hospital*, 6 H. of L. Cas. 338.

The courts, however, will regulate and control such a special trust, whether the fund is derived from individuals, the crown, the State, or the federal government, and enforce its provisions according to law and the terms of the trust. 2 Perry on Trusts, § 707, and cases cited; *Barnum v. Baltimore*, 62 Md. 277, 298, 299; *People v. Canal Board*, 55 N. Y. 390; 2 *Dillon's Mun. Corp.* §§ 567, 909, and cases cited.

The legal title to the trust property.—The legal title to the trust property vests, under the grant, in the State, as trustee, for the particular purpose specified. This proposition can not be disputed, and is clearly the law of New York under the Revised Statutes. But, when the question turns upon the construction to be given to an Act of Congress, the decisions of the Federal courts would be controlling, even if they were in opposition to the decisions of the courts of New York. Such is not the fact, however, as appears from the numerous decisions of the Supreme Court of the United States. *Shulenburg v. Harri-man*, 21 Wall. 44, 60; *Leavenworth, &c., R. Co. v. U. S.* 92 U. S. 733,

741; *Mo., &c., R. Co. v. Kans., &c., R. Co.* 97 U. S. 391, 496; *Railroad Co. v. Baldwin*, 103 U. S. 426, 429; *Wood v. Railroad Co.* 104 U. S. 329, 332; *Van Wyck v. Knevals*, 106 U. S. 360, 365; *Wright v. Roseberry*, 121 U. S. 488, 500; *Rutherford v. Greene*, 2 Wheat. 196.

In a leading case the court said:—"Unless there are other clauses in a statute restraining the operation of present grant, these must be taken in the natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title." "A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires." *Shulenburg v. Hariman*, 31 Wall. 44, 62; *Mo., &c., R. Co. v. Kans., &c., Co.* 97 U. S. 497; *St. Paul, &c., R. Co. v. Greenhalgh*, 36 Fed. Rep. 563; *Wright v. Roseberry*, 121 U. S. 488. "Both in respect to real and personal property, it is the established doctrine that a trustee to receive, manage and disburse, or even with less powers, has the legal title, and is, in contemplation of law, the owner of the property." 1 *Perry on Trusts*, § 305; *Harris v. Amer. Bible Soc.* 2 Abb. App. Dec. 320; *Brewster v. Striker*, 2 N. Y. 19, 31; *Hathaway v. Hathaway*, 37 Hun. 365; *Leggett v. Leggett*, 3 N. Y. 297, 305; *Adams v. Perry*, 43 N. Y. 467, 497; *Marx v. McGlynn*, 88 N. Y. 375, 376; *Goodrich v. Milwaukee*, 24 Wis. 422, 431; *Devin v. Undershoot*, 32 Iowa, 194; *Neilson v. Logan*, 12 How. (U. S.) 98, 107; *Culbertson v. Witbeck Co.* 127 U. S. 327; *Western R. Co. v. Nolan*, 48 N. Y. 513, 517; *Bennett v. Garlock*, 79 N. Y. 302; *Bramhall v. Ferris*, 14 N. Y. 46; *Donovan v. De Mark*, 78 N. Y. 244. In the language of Comstock, J., in *Savage v. Burnham*, 17 N. Y. 569, 570, "a valid trust in lands vests the whole legal and equitable title in the trustee and is inalienable. A sale of the lands during the life of the beneficiary would be in contravention of the trust, and therefore void."

The powers of trustees under deeds of trust depend entirely upon the terms of the deeds. Such powers are created by and exist in the deeds, and, of course, they exist in the terms in which they are created, and in no others. They are only matters of convention and contract between the parties and not of law or jurisdiction. 2 *Perry on Trusts*, § 602, note g, and cases cited. Even in the case of a power in trust under the Revised Statutes of New York, if it be not executed according to its terms, no title will pass by virtue of the power. *Barber v. Cary*, 11 N. Y. 397; *Kissam v. Dierkes*, 49 N. Y. 602.

The execution of the power in trust.—"The duties and powers of trustees cannot be delegated to others unless there is express authority for that purpose given in the instrument creating the trust." The maxim is *delegata potestas non potest delegari*. 1 *Perry on Trusts*, §§ 287, 402, and cases cited; *Newton v. Bronson*, 13 N. Y. 587; *Grover v. Hale*, 107 Ill. 638, 642; *Flower v. Elwood*, 66 Ill. 440, 449; *St. Louis v. Priest*, 88 Mo. 612. Nor can the trustee, after accepting office, by any disclaimer or renun-

ciation, avoid its duties and responsibilities. He cannot be relieved nor discharged without the consent of all parties in interest, except for cause and by the decree of a competent court. 1 Perry on Trusts, §§ 268, 274, 401, and cases cited; Diefendorf v. Spraker, 10 N. Y. 246, 250; Thatcher v. Candee, 4 Abb. App. Dec. 387; Cruger v. Halliday, 11 Paige, 314, 319; Brennan v. Wilson, 71 N. Y. 502, 506. Nor can the trustee, when the trust is created for a specific purpose, even with the consent of the *cestui que trust*, divert the property from the appointed purpose. 1 Perry on Trusts, § 386, note a, and cases cited; Dunham v. Milhaus, 70 Ala. 596; Loving v. Brodie, 184 Mass. 453, 459; Isham v. Del., &c., R. Co. 11 N. J. Eq. 227; Lee v. Horton, 104 N. Y. 541, 542; Wetmore v. Porter, 92 N. Y. 77.

"It is well settled that where a grant is made in trust for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created." Story v. N. Y. El. R. Co. 90 N. Y. 124, 157; Watertown v. Cowen, 4 Paige, 510; Hunter v. Sandy Hill, 6 Hill, 407, 412; Adams v. Saratoga, &c., R. Co. 11 Barb. 414, 450; Barclay v. Howell, 6 Pet. 498; Warren v. Lyons, 22 Iowa, 851; Hellman v. McWilliams, 70 Cal. 449. A private person may so limit the use or application of the income from the trust fund that it cannot be reached even by creditors of the *cestui que trust* or be alienated by anticipation; and the courts go still further and hold that the right of the beneficiary to the income may be so limited by the terms of the trust that the creditors cannot reach it, after coming into his possession, for the payment of his debts. Broadway Nat. Bank v. Adams, 133 Mass. 170; Nichols v. Eaton, 91 U. S. 716; Hyde v. Woods, 94 U. S. 528; Wetmore v. Truslow, 51 N. Y. 388; Locke v. Mabbet, 8 Abb. App. Dec. 69. The United States as donor cannot revoke the trust or resume the title to, or control of the fund, without the consent of all the parties in interest, except for a forfeiture of conditions in the grant. 1 Perry on Trusts, § 104, and cases cited; Gilchrist v. Stevenson, 9 Barb. 9, 15; Isham v. Del., &c., R. Co. 11 N. J. Eq. 227; Adams v. Saratoga, &c., R. Co. 11 Barb. 414, 450; Cincinnati v. White, 6 Peters, 482; Van Wyck v. Knevals, 106 U. S. 360. Nor can the trustee, by any act of his own, divest himself of or convey away the legal title to the fund, particularly to persons having knowledge or notice of the trust. Gilchrist v. Stephenson, 9 Barb. 9, 15; Isham v. Del., &c., R. Co. 11 N. J. Eq. 227; Reid v. Bank of Mobile, 70 Ala. 199; Swan v. Lindsay, 70 Ala. 507, 521; Lee v. Horton, 104 N. Y. 451; Wetmore v. Porter, 92 N. Y. 77; Stockton v. Newark, 42 N. J. Eq. 531; Pierce v. Weaver, 65 Tex. 45.

The State as trustee is amenable to the general rules governing trusts. —The State, in its dealings with others, as we have seen, is amenable to the same rules of law as individuals, and, therefore, could vest no

greater rights by grant in another than it possessed at the time. The principle is established by the decisions of the highest courts in this country, that "grants made by a legislature are not warranties, and the rule universally applied in determining their effect is, that if the title granted was not in the grantor at the time of the grant, no estate passes to the grantee." *Rice v. Railroad Co.* 1 Black, 359, 374; *Patterson v. Winn*, 11 Wheat. 380, 384; *Polk v. Wendell*, 9 Cranch, 87, 101; 5 Wheat. 293, 303; *Jackson v. Lawton*, 10 Johns. 23. Such a grant is an executory trust in which the State, as trustee, is empowered and required to designate the particular colleges or beneficiaries who are to receive the income; and to settle or determine the details of the application and expenditure of the income, within the limits of the general outline of the trust contained in the Act of Congress. *Wood v. Burnham*, 6 Paige, 518; affirmed 26 Wend. 19; 1 *Perry on Trusts*, § 359, and cases cited. Doubtless the State has a large discretion in selecting beneficiaries from the class of colleges, and in choosing methods and agencies for the conversion of the scrip into an available fund. But Congress has hedged it around with limitations it could not transcend. What were these limitations? Simply that the State could not acquire title to lands in other States, but should retain the title to the fund, the avails of all the sales of scrip representing land, invest it in certain stocks yielding not less than five per cent., paying all expenses out of the treasury, and deliver over the gross income to the college or colleges it had selected for that purpose.

Within these limitations, however, the State has absolute power and control of the trust. The State itself is interested in the preservation of the fund, and in the proper application of the income. It is all to be expended within the limits of the State, for a public use or purpose within the province of the local government to regulate and control, so that it relieves the State to that extent from a similar expenditure of its own funds; and the State, therefore, has a direct beneficial interest in the proper administration of the trust. *Home of Friendless v. Rouse*, 8 Wall. 430, 437; *Washington University v. Rouse*, 8 Wall. 440; *Vincennes University v. Indiana*, 14 How. (U. S.) 269, 274. It follows, as a necessary sequence, that Congress could not repeal the act of 1862, so as to divert the interest of the State, without its consent, after it had accepted the trust. *Terrett v. Taylor*, 9 Cranch, 43, 50; *Pewlett v. Clark*, 9 Cranch, 292, 332, 336; *Vincennes University v. Indiana*, 14 How. (U. S.) 269; *Home of Friendless v. Rouse*, 8 Wall. 431, 436; *Farrington v. Tennessee*, 95 U. S. 679, 683. But there was also an actual consideration for the grant by Congress to the State, as the State agreed not only to perform the duties of trustee without compensation, but also to pay all the expenses of converting the scrip into an available fund, "so that the entire proceeds of the sales," in the language of the grant, "shall be applied without any diminution whatever" to the trust fund; and the State also agreed to pay all the ex-

penses of administering the trust "so that the capital of the fund shall remain forever undiminished, and the annual interest shall be regularly applied without diminution to the purposes" of the trust. If, therefore, the act could not be repealed in the case of a naked grant, so as to divest the interest of the State, *a fortiori* it cannot be done where the grant is founded on a consideration. *Fletcher v. Peck*, 6 Cranch, 87, 135; *Curran v. Arkansas*, 15 How. (U. S.) 304; *Von Hoffman v. Quincy*, 4 Wall. 535; *Baring v. Dabney*, 19 Wall. 1, 10.

The designation of a beneficiary.—The same rule applies to the acts of the legislature, which are in violation of the trust, as between the State and the designated beneficiary. Thus, for example, the New York act of 1865, incorporating Cornell University, was a valid exercise of legislative power, making the University the sole beneficiary of the income from the trust fund forever. This designation or grant was made upon the express condition that Ezra Cornell would donate \$500,000 to the University, and he accordingly made such a donation as the consideration for the legislative grant. The charter also made it incumbent upon the University, as a condition of the grant, to receive one scholar annually from each assembly district in the State, free of charge, and give him instruction in any branch of study in any department of the institution; and the University has always performed this condition in consideration of receiving the annual income from the fund. The most beneficial clause in the charter conferring the right to the income from the trust fund cannot, therefore, be repealed or altered without the concurrence of the University. *Dartmouth College v. Woodward*, 4 Wheat. 518; *Woodruff v. Trapnall*, 10 How. (U. S.) 190; *Curran v. Arkansas*, 15 How. (U. S.) 304; *State Bank v. Knoop*, 16 How. (U. S.) 369; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Jefferson Bank v. Skelly*, 1 Black, 436; *Vincennes University v. Indiana*, 14 How. (U. S.) 269; *McGee v. Mathis*, 4 Wall. 143; *Home of Friendless v. Rouse*, 8 Wall. 431; *Wash. University v. Rouse*, 8 Wall. 440; *Barrings v. Dabney*, 19 Wall. 1, 10; *Farrington v. Tennessee*, 95 U. S. 683; *Canal, &c., Co. v. Tedesco*, 37 La. An. 100; *Assessors v. Morris, &c.*, R. Co. 49 N. J. L. 193. The Act of Congress "created, *ipso jure*, a trust, and made the State a trustee for the parties provided for by it. It was a trust on which the colleges, when made acquainted with its terms, had a right to rely. They became, if they assented to it, *cestuis que trust* with vested rights." *Baring v. Dabney*, 19 Wall. 1, 9.

The matters treated in this note were very fully and learnedly considered in the argument of Edward Countryman, Esq., of Albany, N. Y., as counsel for the appellants to the Court of Appeals of New York, in the Matter of McGraw, 111 N. Y. 66.

INDEX.

ADEMPTION.

The rule of ademption is predicable of legacies of personal estate, and is not applicable to devises of realty. A specific devise of real estate can only be revoked by the destruction of the will or the execution of another will or codicil, or by an alienation of the estate during the testator's life. *Burnham v. Comfort*, 278
See LEGACY.

ADVANCEMENTS.

Where certain shares of bank stock are given by will to relatives of the testator, and it is provided in the will that any advances to the legatees shall be deemed a partial satisfaction of the legacy of stock, the gift of the bank stock is a specific legacy, and a subsequent gift by codicil of a sum of money is cumulative, and not an advancement within the meaning of the will. *In Re Zeile*, 108
See CODICIL; SPECIFIC LEGACIES, 1.

AFTER-ACQUIRED PROPERTY.

See LATENT AMBIGUITY.

AFTER-ACQUIRED REALTY.

A will devising all the testator's real estate gives to the devisee any after-acquired estate in land which belonged to the testator at his death. *Dickerson's Appeal*, 352

ALABAMA CLAIMS.

See BEQUESTS, 2.

AMBIGUITY.

See BEQUESTS, 8; MISNOMER.

ANCILLARY PROBATE.

When a will, executed in another jurisdiction, where the testator lived and died, has been admitted to probate there, ancillary probate of it may be granted here, on the production of a transcript properly certified (Code, § 2813); and neither the failure to give notice to parties in interest, nor the fact that the proof of execution and attestation, as shown by the transcript, is defective, renders such ancillary probate void. The will being regular on its face and appearing to have been attested by the requisite number of witnesses, the original probate, though irregular and made on defective proof, having stood unquestioned for over forty years, all presumptions will be indulged in its favor. *Dickey v. Vann*, 46
See FOREIGN WILLS, 1, 2, 3.

ANNUITIES.

See REQUESTS, 6.

REQUESTS.

1. The word "ornaments" in a will includes the jewelry used by the testatrix for her personal decoration. *In Re Traylor*, 67
2. A testator who died in April, 1875, provided in his will "All the residue of my estate, real, personal and mixed, of which I shall die possessed, or which I may be entitled to at my decease, I give, devise and bequeath to my faithful wife Katharine A. Stidworthy for the term of her life, with the right and power to use and dispose of the income, rents, profits and interest of the same, and with the further right to apply to her use if needed, any part of the principal of the personal property, making her sole judge of the need of so doing; and after her death I give and devise the same, or what shall then be left unapplied and unconsumed, to my children to be divided equally between them, the children of any deceased child to take the share of their parent; if all my children and grandchildren should die in the lifetime of my said wife, then I will that the property shall go and belong to her absolutely, to dispose of at her pleasure, and if she does not dispose of it by gift or otherwise in her lifetime to descend to her lawful heirs." *Held*, that a claim allowed the administrator with the will annexed, by the court of commissioners of Alabama claims, under the Act of Congress of June 5, 1882, passed by the will to the use of the widow; and that she was entitled to the custody of the fund arising therefrom upon giving bond to the judge of probate, with sureties, for the faithful management and preservation of the fund according to the terms of the will. *Pierce v. Stidworthy*, 254
3. A married woman, alleged to be possessed of realty "of the value of \$10,000, and other real and personal property of a value to the plaintiff unknown," by her will, gave pecuniary legacies amounting to \$2,100 to two married daughters and to her son, who was her executor, and, after expressing a desire that her husband should be supported out of her property, left the residue of her estate to two adult unmarried daughters subject to the condition that they "support their father during his life." *Held*, that the husband had no interest under the will which a creditor could reach by a bill in equity under the Pub. Sta. c. 151, § 1, cl. 11. *Baker v. Brown*, 289
4. A testator bequeathed to his wife, in lieu of dower, the income for life of the residue of his estate after the payment of two legacies to herself, and also so much of the principal as should be necessary to give her "a good and comfortable support." With \$1,100 of her own money, and \$2,500 paid her from the principal of the trust

BEQUESTS—continued.

fund, which was paid to her with the consent of the remainderman, she purchased a house, in which she lived for several years on the income received from her husband's estate. Subsequently, the income became insufficient for her support, and she requested that another part of the principal be paid to her. *Held*, that she was not obliged to dispose of her house and use the proceeds thereof for her support, before her request could be granted. *McKenzie v. Ashley*, 808

5. Whether one whose estate is solvent can dispose by will of money accruing from his life insurance and made by the terms of the policy payable to his legal representatives, *quære*. *Blouin v. Phaneuf*, 826
6. A bequest to the testator's wife of the sum of \$50 per month for the support and maintenance of herself and daughter, to be paid monthly from the income of his estate, and on the marriage of the daughter her support to cease, creates a trust in the widow, one-half of the annuity to be applied for her own support, and the other for the support of the daughter during the life of the widow. *Id.*
7. Where the by-laws of a mutual benefit association, not a domestic corporation, provide for the payment of a sum of money to the dependents of a member and fix definitely the manner of changing the beneficiary, upon the death of the assured, unless a change has been made in the manner specified, the beneficiary named in the certificate becomes the absolute owner of the fund, unaffected by a will attempting to make a different disposition thereof; and, if the beneficiary is a minor under guardianship, the guardian is entitled to the possession and control of the money as against the assured's executors. *Holland v. Taylor*, 586
8. Foreign corporations may take bequests of charities under a will made in this State, when and to the extent authorized by their charters. When such corporations are improperly described in the will, the bequest will not fail, if it be clearly shown by proper proof what corporations were meant by the description. *The University v. Tucker*, 597
9. Where the will gave to a devisee in clear and express words a life-estate only, and in the codicil provided that moneys paid to the executor on "obligations owing to the testator should be invested in bonds of the United States, the interest of which should go to said life-tenant, and such life-tenant should likewise have the profits of the testator's estate not given to his wife," by the use of this language he did not change the life estate into a fee. A contingent remainderman may maintain an injunction to restrain waste by the life-tenant. Taking clay from the soil by a life-tenant, and manufacturing the same into brick and selling the same, is waste. *Id.*

BURDEN OF PROOF.

See TESTAMENTARY CAPACITY, 1.

CHARGING THE REALTY.

A testator, after declaring that his executor should pay all his just debts and funeral expenses as soon after his decease as possible, gave all his personal property, and \$3,500 in cash, out of his real estate, as soon as sold by his executor, to his wife ; and in a subsequent item of his will gave \$500 to another ; and in a subsequent item devised the balance of his estate to his two brothers, to be divided between them share and share alike ; and directed all his real estate to be sold at public sale, by his executor, within one year after his decease. *Held* :

(a) That the personal estate, being the primary fund for the payment of debts and funeral expenses, was not, by the terms of said will, or by a proper construction thereof, exonerated from such liability ; nor was the said real estate charged therewith.

(b) That the gift of all his personal property by the testator to his wife was not specific in any other sense than as distinguished from the real estate or the balance of the testator's estate, being the proceeds of the sale of his real estate after the payment to which the same was properly subject was deducted.

(c) That, the whole frame and scheme of the will showing that the testator intended the legacy of \$500 should be paid absolutely and at all events, and he having previously given all his personal property and \$3,500 to his wife out of the sale of his real estate, the said balance of his estate is subject to the payment of the said legacy of \$500.

(d) The court will not, solely on the application of a legatee named in a will, direct the person having the execution of the will how to administer the estate, such person not asking for instructions and the bill filed not praying relief. *Miller v. Cooch*, 435

CHARITABLE BEQUESTS,

See FOREIGN WILLS, 3; PERPETUITIES, 3.

CHARITABLE USES.

1. The legacy of a specified sum "the income only to be expended annually," by the legatee, is an absolute legacy. A testator bequeathed two hundred thousand dollars to the American Baptist Home Mission Society ; "one-half of which is to be applied in aid of freedmen's schools (other than the Wayland Seminary)," and he also bequeathed fifty thousand dollars to the Wayland Seminary of Washington. *Held*, that the whole legacy, consisting of \$250,000, should be paid to the mission society, it appearing that the Wayland Seminary is a school established and maintained by said mission society. *Dascomb v. Marston*, 248

CHARITABLE USES—continued.

2. A legacy to certain trustees, "to be appropriated at their discretion in founding a free public library," in a town named is valid. A bequest to a town for the worthy and unfortunate poor, one-half of the income of the same to be expended by a woman's aid society formed for that purpose, is valid, whether such a society exists or not. *Id.*
3. Charitable bequests of a public nature are to be favorably and liberally construed, and in such a manner as to effectuate the intentions of the donor. *Hunt v. Fowler*, 444
See CY PRES, 1, 2, 3.

CODICIL.

- In general a will and codicil are to be taken together as constituting one testamentary act; but this rule does not apply where it appears that the word "will," as used by the testator, was not intended to include the codicil. *Sloane v. Stevens*, 1
See ADVANCEMENTS; HOLOGRAPHIC WILLS, 2.

CONCEALED OR DEPORTED WILL.

See STATUTE OF LIMITATIONS.

CONDITIONAL DEVISE.

Real estate passes under a clause in a will, giving and devising all the rest and residue of the testator's property and estate of every description, and wherever situate, after the payment of all debts and certain legacies named, unless such construction be prevented by the other parts of the will. *Chapman v. Chick*, 310

CONSTRUCTION.

1. Whether the word "children," as used in a will, was intended to be limited to its primary meaning, or to be used in the broader sense of "issue," may be determined by a resort to the context; and that meaning ought to be preferred, when the reason of the matter sustains it, which makes it include the children of a deceased child. *Matter of Paton*, 6
2. Where there is a devise to several persons, with a devise over to the "survivors" in the event of the death of one of the devisees, the word "survivors" will be given its natural and literal meaning unless it appear from other provisions of the will that the testator used it as synonymous with "others." *Gorham v. Betts*, 141
3. Where a testator devises to A. and B. all his real and personal estate whatsoever, share and share alike, but in case of death of either of them it is to go to their children, the devisees surviving the testator take an absolute interest in both the personal and real estate devised to them. The words "in case of death of either of them" mean death in the lifetime of the testator, and not death at any time however distant. *Jones v. Webb*, 422

CONTRIBUTION.

See SPECIFIC LEGACIES, 1.

CORPORATIONS.

See REQUESTS, 8.

COVENANT TO STAND SEIZED.

See WILL, 1.

CY PRES.

1. A devise to a church "to be applied to foreign missions" is within the statute permitting devises to charitable uses. *Kinney v. Kinney*. 153
2. In New York the English doctrine of *cy pres* and the doctrine of trusts for charitable uses, as distinguished from private trusts governed by the general rules of law, do not prevail; and in general the absence of a defined beneficiary, entitled to enforce its due execution is a fatal objection to the validity of a testamentary trust. *Holland v. Alcock*, 188
3. It is a general rule in the construction of wills that the intention of the testator is to govern, but it is the intention expressed by the will. The doctrine of *cy pres* has never been recognized in this State. Trusts for educational and religious purposes, and for the benefit of the poor, the sick, the afflicted, and the helpless, are charitable. The Court of Chancery in this State has been accustomed to exercise only the judicial function of the English Court of Chancery; but the ordinary powers of a court of equity, applied properly to the subject-matter, are sufficient to carry into effect all charitable bequests reasonable in their character and proper in their objects. *Doughten v. Vandever*, 393
See CHARITABLE USES, 1, 2, 3.

DEBTS AND LEGACIES.

See CHARGING THE REALTY; LATENT AMBIGUITY.

DEMONSTRATIVE LEGACIES.

See SPECIFIC LEGACIES, 2.

DEVISE.

- A devise of realty is impliedly revoked by a subsequent conveyance thereof to a person other than the devisee, and the proceeds of such a sale go not to the devisee but fall into the residuum. *Emery v. The Union Society*, 330

DOWER.

- A widow electing to take the provision made for her in the will of her husband, will be barred of dower in land of which he was seized as an estate of inheritance during coverture, and which was sold and conveyed on foreclosure of a mortgage executed by him in which she did not join, unless it plainly appears by the will that she should have such provision in addition to her dower. *Corry v. Lamb*, 567

EDUCATIONAL CORPORATIONS.*See* BEQUESTS, 8.**ELECTION.***See* DOWER.**EQUITABLE CONVERSION.**

1. Where a testator, by his will, directs the sale of his land by the executor, and the division of the proceeds equally among the testator's children, this will be a devise of money and not a devise of land; and the executor may be held responsible for the value of the land, when he corruptly, or through gross negligence, sells the same for less than its value. The county court may therefore charge him, on final settlement, with such a sum as he might have realized by reasonable care and diligence. *Matter of Corrington*, 120
2. A direction in a will for equitable conversion may be absolute and imperative, or it may be for the purposes of the will only. *Parker v. Linden*, 411

EXECUTION.

Where the signature of the testator precedes a final clause appointing executors, the will is not signed "at the end thereof" within the meaning of the statute of Pennsylvania, and a will so signed should not be admitted to probate. *Appeal of Wineland*, 349

EXECUTOR.

A testator can exercise his power of appointing an executor through an agent after his death. *Bishop v. Bishop*, 499

FOREIGN CORPORATIONS.*See* BEQUESTS, 8.**FOREIGN WILLS.**

1. A valid judgment of another State determining the domicile of a deceased person is conclusive as between the parties, and the question cannot be opened and enquired into in proceedings involving the same issues in the courts of this State. *Thomas v. Morrisett*, 525
2. No general administration should have been granted when there was a will in existence which was afterwards proved and admitted to probate in the State of the testator's domicile; nor should a partial or limited administration have been granted in this State where no resident of this State was interested in the estate either as creditor, legatee, or distributee. *Id.*
3. Restrictions of testamentary power with respect to charitable bequests in this State are not applicable to the will of a testator domiciled in a foreign State, nor is probate to be denied because of the existence of void bequests. *Id.*

See ANCILLARY PROBATE.

FUTURE ESTATES.

All future estates limited upon an estate for life, which are not sure to take effect within twenty-one years—with the usual period of gestation added—after the determination of the life estate, are void as within the rule against perpetuities. *Coggin's Appeal*, 338

GENERAL LEGACY.

See LEGACY.

GENERAL RESIDUARY CLAUSES.

See RESIDUARY CLAUSES.

HOLOGRAPHIC WILLS.

1. A reference in an holographic will to a letter not in existence at the time of its execution, will not serve to constitute such letter when subsequently written a part of the will; but the will may be admitted to probate and the letter excluded. *In Re Shillaber*, 70
2. A will wholly written, signed and sealed by the testator, who is of sound mind, containing an attestation clause unsigned by witnesses, is valid; and another paper of a testamentary character bearing same date, and found folded up with the will and written and signed by the testator, is a valid codicil, though it does not refer to the will. *Perkins v. Jones*, 124

IMPLIED REVOCATION.

See DEVISE.

INCOME.

See RESIDUE.

INSANE DELUSIONS.

See TESTAMENTARY CAPACITY, 2.

INSANITY.

See TESTAMENTARY CAPACITY, 2.

INSURANCE POLICY.

See BEQUESTS, 7.

INTEREST.

Upon a legacy of money made payable by the will within eighteen months after the testator's death, no interest accrues before the time fixed for its payment; and where the executor made certain payments on account of the legacy, during the eighteen months, no interest was properly chargeable. *Thorn v. Garner*, 513

INVALID WILL.

See PROBATE, 1.

JURISDICTION OF PROBATE COURT.

See MISNOMER.

LATENT AMBIGUITY.

Extrinsic evidence is admissible to explain a latent ambiguity, but not to contradict or add to the terms of a will. The word "money" is presumed to have been used by the testator in its ordinary or usual significance, and, in the absence of a contrary intention in the context, cannot include the general personal estate. But a bequest of money "remaining," where a contrary interpretation would leave a part of the estate undisposed of, may signify the residue of the property, and after-acquired property may pass under such a residuary clause. *Decker v. Decker*, 455

LEGACY.

Where a testator in his lifetime makes a gift to a person to whom by his will he has given a general legacy, with the intent that it should be a satisfaction of or substitute for the legacy, the gift will operate as an ademption of the legacy. The intent of the testator is the decisive thing in the matter; the assent of the legatee is not necessary. *Cowles v. Cowles*, 469

LIFE ESTATES.

1. In construing a doubtful clause in a will regard ought to be had rather to the testator's intention as indicated by his language, than to formal rules of interpretation, however sound, or to the decided cases in point, however on all fours. *Robison v. Female Orphan Asylum of Portland*, 51
2. A bequest of a life estate to a son, the remainder to be "distributed or go to his personal representatives who would be entitled to his personal estate according to law," creates an estate which does not vest in the son, and the personal representatives of the son, who are his next of kin, take the remainder under the will of the testator. *Davies v. Davies*, 361
3. A testator devised certain land to his wife, giving her full power and authority to sell and convey the title thereof at any time and convert the avails to her own use and benefit, and his will then proceeded:—"I further bequeath during her natural lifetime one span of horses," and all other items not otherwise disposed of, "during her natural life as aforesaid," and at her death "all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may remain unexpended, to my two sons (naming them), and to their heirs and assigns forever." *Held*, that the widow took only a life estate, with a power of disposition, and that the sons took the remainder, or such part as remained undisposed of at her death and could be identified. A power of sale superadded to a life estate does not enlarge it to a fee. *Walker v. Pritchard*, 381

LIFE ESTATES—continued.

4. An absolute bequest in trust, limited over upon marriage and birth of issue passes, upon the death of the legatee unmarried and without issue, to her executor. *Snyder v. Baker*, 552
See FUTURE ESTATES; BEQUESTS, 2, 4, 6, 9.

LIFE INSURANCE POLICY.

See BEQUESTS, 7.

LIMITATION OF TIME FOR PROBATE.

See TIME WITHIN WHICH TO PROBATE A WILL.

LIMITATION OVER.

See LIFE ESTATES, 4.

LOST WILL.

See STATUTE OF LIMITATIONS.

MARRIAGE AND BIRTH OF ISSUE.

See REVOCATION, 1, 2, 3, 4.

MISNOMER.

1. The parol evidence of the scrivener is admissible to show that the plaintiff was the person designated as devisee by the testatrix and that the misnomer arose through the scrivener's mistake as to the devisee's initials. *Covert v. Sebern*, 559
2. The last of two clauses irreconcilably repugnant, is to be enforced as the latest expression of the intention of the testatrix. *Id.*

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PAROL EVIDENCE.

See MISNOMER.

PERPETUITIES.

1. A gift to a life tenant of an estate in land destructible in the lifetime of such life tenant does not, even though the power be unexercised, infringe the rule against perpetuities. *Mifflin's Appeal*, 264
2. Where an unmarried woman who, in anticipation of marriage, executes a deed of trust of all her property to certain trustees for her benefit during her lifetime, and upon her death to convey as by her will she should direct, subsequently thereto married and died leaving two children, and a will, by which she gave her estate in trust to her executors for the benefit of the children, with remainder, on the death of either, to her heirs or next of kin, it was *held* that the deed of trust created a valid and indefeasible estate in the trustees, which neither the settlor alone nor in conjunction with the trustees could abrogate, and that the trusts attempted to be created by the will were in contravention of the statute against perpetuities, because they constituted a suspension of the power of alienation for three lives, two of them not in being at the time of the creation of the power. *Genet v. Hunt*, 477
3. A bequest to executors, coupled with a direction to them to obtain

PERPETUITIES—continued.

from the legislature, "as early as practicable," or "before the expiration of ten years after my decease," a charter for a charitable institution to be the recipient of the gift, is invalid, as an unlawful suspension of the power of alienation; the gift contemplated a period, measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed. *Cruikshank v. The Home for the Friendless*, 490

POWER TO MAKE A WILL.

See TESTAMENTARY CAPACITY, 1, 2.

PRECATORY TRUSTS.

See TRUSTS, 1, 2.

PRECATORY WORDS.

A testator, after expressing his "desire" that a residue should go to his grandchildren, "reserving the use of the personal property and the net income of the real estate" to his son's wife, their mother, "during her life and widowhood" if she survived his son, "to this end" gave the residue to his son in trust to apply the income "at his discretion" for the care and education of such grandchildren; provided that, if his son should die, his son's wife while his widow "shall in like manner receive" such income "to her own use and for the education and support of my said grandchildren at her discretion;" and directed that neither his son nor his son's wife should be held to account for property personally occupied by them, and that proceeds of real estate should be applied to improve his estate, or for the grandchildren's education and support. *Held*, that the son's wife, as his widow, had the right in good faith to appropriate the whole income to her own use. *Sturgis v. Paine*, 294

PRESUMPTION FROM LAPSE OF TIME.

See ANCILLARY PROBATE.

PRESUMPTION OF DEATH.

A man left his wife and family in August, 1871, to seek work. His wife heard from him only twice after he left, the last time being about three weeks after so leaving, and she never heard from him again, though she made inquiries. At the time he left his health was "fair," although he was then "drinking hard," and had been for some years. *Held*, that these facts were sufficient to raise a presumption of fact that he died before June 21, 1881. *Stockbridge, Petitioner*, 269

PROBATE.

1. An alleged testamentary writing presented for probate which does not in its form comply with the requirements of the statute is not a will, and the decree of the register admitting such a writing to probate is ineffective to make a will out of it. *Wall v. Wall*, 180

PROBATE—continued.

2. Every instrument purporting to be the last will and testament of any person, should be filed in the probate court in due time after the testator's decease, and it is a punishable offense to withhold the instrument from the possession of the court. *Keniston v. Adams*, 223
3. The fact that a will contains a gift to a town in trust does not render a tax-paying resident thereof an incompetent witness to the will. Neither does the fact that the will provides for a legacy to an incorporated association render a stockholder thereof an incompetent witness. *Marston et al., Petitioners*, 329

REMAINDERS.

See LIFE ESTATES, 1, 2, 3, 4.

REPUGNANCY.

See MISNOMER.

RESIDUARY CLAUSES.

A general residuary clause, not circumscribed by clear expressions in other parts of a will, includes any property or interests of the testator which are not otherwise perfectly disposed of, and all that for any reason eventually fall into the general residue. *Riker v. Cornwall*, 415

RESIDUE.

Where there is a bequest of the whole or of an aliquot part of the residue of an estate to a legatee for life, with remainder over, and no time is fixed by the will for the commencement of the life estate, the legatee is entitled to the income from the residue, as the same may be ascertained, to be computed from the death of the testator.

Lawrence v. The Security Company, 502

RESTRICTIONS UPON ALIENATION.

See TRUSTS, 3.

RESTRICTIONS UPON TESTAMENTARY POWER.

See FOREIGN WILLS, 3.

REVOCATION.

1. The implied revocation of a will by subsequent marriage and birth of issue, under the statute of Alabama (Code of 1886, § 1953), is based on a presumed alteration of intention, arising from changed circumstances, new relations and duties; and the presumption is made conclusive, unless provision is made for the after-born child, or an intention not to make provision is shown in the will; but the presumption may be rebutted by a settlement providing for the child, made after as well as before the execution of the will. *Gay v. Gay*, 35
2. The statutes which provide for the revocation of wills by the sub-

REVOCATION—*continued.*

- sequent marriage of the testator are for the benefit of the widow in case of an ante-nuptial will. Accordingly, where a legatee five days after the execution of the will becomes the wife of the testator, such a marriage does not revoke the will and the widow is entitled to take under its provisions. *Fidelity Trust Company's Appeal*, 184
3. The will of a *feme sole* is not revoked by her marriage. *Emery, Appellant*, 336
4. A statute providing for the revocation of a will by subsequent marriage and birth of issue is prospective only. It does not operate upon a will made previously, where the marriage or birth had occurred at the time of the passage of the act, although the testator died afterwards. *Goodsell's Appeal*, 519

RIGHTS OF CREDITORS.

See BEQUESTS, 8; TRUSTS, 3.

RULE IN SHELLEY'S CASE.

- A devise to one "during her natural life, and after her death to the begotten heirs or heiresses of her body," vests in the devisee an absolute estate in fee simple, under the rule in Shelley's Case. *Leathers v. Gray*, 72

SIGNING THE WILL.

See EXECUTION.

SPECIFIC LEGACIES.

1. A bequest of the testator's "bank stock" is to be construed as describing deposits in savings banks owned by the testator, if he owns no shares of stock in a bank. A bequest of "all the mill stock and bank stock remaining in my name after the decease of my said wife" is specific, and not general. If shares of stock, specifically bequeathed by a will, are appropriated to satisfy the claims of the testator's widow, who has waived the provisions of the will in her favor, the legatee is entitled to contribution from other legatees under the will. *Tomlinson v. Bury*, 261
2. In view of the facts disclosed, *held*, that certain legacies to the testator's children were specific or demonstrative and not general. *Bradford v. Brinley*, 279

See ADVANCEMENTS.

SUBSTITUTION.

See LEGACY.

SURVIVORSHIP.

- A testator devised all his real estate to his son for life, with remainder to the three infant children of his son, in fee. The testator, his son, and the wife and three children of his son having perished in

SURVIVORSHIP—continued.

the same catastrophe, it was *held*, that the evidence warranted the finding that the testator died before his son, and the son before either his wife or the three children, that the estate vested, under the will, in the three children, and that its descent must be traced from them. *Will of Ehle*, 80

STATUTE OF LIMITATIONS.

When a will is fraudulently concealed by one interested in its non-production, the statutory bar of twenty years within which a will may be offered for probate does not commence to run until the will is discovered. *Deake, Appellant*, 217

TESTAMENTARY CAPACITY.

1. Testamentary capacity is essentially a question of fact to be determined after due consideration of all the evidence ; and although, where there is a will duly executed, there is a legal presumption of sanity in favor of the testator, still, where, in a civil proceeding touching the validity of the will, the question of sanity or insanity is directly in issue, the burden of proof is upon him who asserts the sanity of the testator. *Chrisman v. Chrisman*, 158
2. The fact that a man becomes prejudiced against some of his children without sufficient cause, and makes unjust remarks about them not warranted by the facts, does not show that he has insane delusions, or is devoid of testamentary capacity. A testator has a right to leave his property to his children or other relatives in unequal proportions, and, other things being equal, such disposition is valid, whether it be reasonable or unreasonable, just or unjust. The reasonableness or justice or propriety of his will are not questions for the jury to pass upon, except, perhaps, so far as they may be considered as circumstances in determining the testamentary capacity of the testator. *Schneider v. Manning*, 372

TIME WITHIN WHICH TO PROBATE A WILL.

A will devising real estate may be admitted to probate at any time after the death of the testator. *Haddock v. Boston & Maine Railroad*, 42

TRUSTEES.

Where a husband devises property to his wife absolutely, upon her assurance that she would hold it for life and devise the remainder to his heirs, the wife takes the property charged with a trust and is, in equity, trustee for the heirs. *Gilpatrick v. Glidden*, 314

TRUSTS.

1. No precise or technical language is required to create a valid trust by will, and there can be no general rule for determining whether given language in a will conveys the whole beneficial interest, or whether it creates a trust. If the will creates a valid trust by apt

TRUSTS—*continued.*

words it is not invalidated by being called "precatory." Where property is given absolutely by will a Court of Chancery will not lightly impose upon it a trust upon the strength of mere words of recommendation; but where the precatory clause expresses clearly the donor's wish that the donee shall do a given thing with the property, an obligatory trust is created which equity will enforce. *Colton v. Colton*, 11

2. A testator devised real estate to his widow in fee simple, adding these words: "I only make this request of her, and only as a request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz.: That in the event she should marry again she will see that the interests of our children in said property are protected." *Held*, that the widow takes an absolute estate in the land, and does not hold it in trust for herself and children. If the extent of the interest of the children had been fixed by the provisions of the will, a trust might arise for their benefit. *Sale v. Thornberry*, 149

3. Where a testator devises real estate in trust, the trustee to collect the rents and profits, and to pay the same to the testator's son, "into his own hands, and not into another, whether claiming by his authority or otherwise," the intention of the testator is that the income shall be paid into the hands of his son, to the exclusion of all other persons, whether claiming as alienees or as creditors; and such rents and profits, while in the hands of the trustee, cannot be reached by the creditors of the *cestui que trust* by any process either at law or in equity. *Smith v. Towers*, 589

See REQUESTS, 6; PERPETUITIES, 2, 3.

UNDUE INFLUENCE.

Any undue influence is ground for setting aside a will. It is not necessary that it should be by one who is a beneficiary of the will. *In Re Cahill*, 96

WILL.

1. A paper in the form of a will, executed in consideration of personal services rendered or to be rendered, or other valuable consideration, and delivered to the devisee or legatee therein named, may constitute an irrevocable contract. Such testamentary paper, when founded on valuable consideration, is in the nature of a covenant to stand seized to the use of the promisee; and it will be enforced in equity under a bill in the nature of specific performance, by fastening a trust upon the property in the hands of an executor, legatees and devisees, under a subsequent inconsistent will. *Bolman v. Overall*, 59

WILL—continued.

2. An instrument in writing may be a contract in one part thereof, concerning one piece of property, and in another part may be testamentary in relation to other and distinct property. If an instrument in writing concerning real estate passes a present interest therein, although the right to its possession and enjoyment may not accrue until some future time, it is a contract; but if the instrument passes an interest or right only upon the death of the maker, it is testamentary in its nature. *Reed v. Hazelton*, 532
3. An instrument to the effect that at the death of the maker thereof, his estate, or executor, should pay a certain amount of money to a designated person, although signed, sealed, witnessed and delivered as a writing obligatory, is nevertheless testamentary in its nature, there being no words to create a *debitum in presenti*; and if, by reason of being attested by but one witness, it fail of effect as a testamentary paper, it cannot on that account be construed as a bond. *Coxer v. Stem*, 548
4. An instrument in the common form of a deed with covenant of warranty, executed, delivered and acknowledged as a deed, is not a will although it be expressed to take effect at the grantor's death; nor is a conveyance of a freehold estate, with possession merely postponed until the grantor's death, invalid as a grant *in futuro*.
Bunch v. Nicks, 576

WITNESSES.

See PROBATE, 8.

WORDS AND PHRASES.

"will."	<i>Sloane v. Stevens</i> ,	1
"children," "issue."	<i>Matter of Paton</i> ,	6
"ornaments."	<i>In re Traylor</i> ,	67
"survivors."	<i>Gorham v. Betts</i> ,	141
"all the residue."	<i>Pierce v. Stidworthy</i> ,	254
"bank stock."	<i>Tomlinson v. Bury</i> ,	261
"a good and sufficient support."	<i>McKensie v. Ashley</i> ,	308
"rest and residue."	<i>Chapman v. Click</i> ,	310
"in case of the death of either of them."	<i>Jones v. Webb</i> ,	422
"money."	<i>Decker v. Decker</i> ,	455

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